# RECORD, CASE NO. 13893.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 274.

CHARLES E. MILLER AND DANIEL G. ROLLINS, EXECUTORS OF CHESTER A. ARTHUR, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFFS IN ERROR,

VS.

JAMES M. CONSTABLE ET AL., SURVIVORS OF ARNOLD, CONSTABLE & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of error | 1 | 1 |
| Clerk's certificate and return | 2 | 1 |
| Summons | 3 | 2 |
| Bill of particulars | 5 | 3 |
| Writ of certiorari | 7 | 4 |
| Declaration | 9 | 4 |
| Plea | 12 | 6 |
| Order substituting Arthur's executors as defendants | 14 | 6 |
| Minutes of trial | 16 | 7 |
| Judgment | 17 | 7 |
| Bill of exceptions | 19 | 8 |
| Protest, August 24, 1874 | 20 | 8 |
| Motion for verdict for defendant | 21 | 9 |
| Judge's certificate | 22 | 9 |
| Assignment of errors | 24 | 10 |
| Joinder in error | 26 | 10 |
| Citation | 28 | 11 |
| Proof of service of citation | 29 | 11 |

1 UNITED STATES OF AMERICA, ss.

*The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:*

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between James M. Constable et al., survivors of Arnold, Constable & Co., plaintiffs, and Charles E. Miller & Daniel G. Rollins, executors of Chester A. Arthur, defendants, a manifest error hath happened to the great damage of the said Charles E. Miller & Daniel G. Rollins, executors of Chester A. Arthur, as by their complaint appear. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and eighty-nine, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN A. SHIELDS,
*Clerk.*

The foregoing writ is hereby allowed:

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
*Southern district of New York, ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the forgoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to twenty-nine inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Charles E. Miller and Daniel G. Rollins, executors of Chester A. Arthur, plaintiffs in error, against James M. Constable et al., survivors of Arnold, Constable & Co., defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 26th day of October, in the year of our Lord, one thousand eight hundred and eighty-nine, and of the independence of the United States the one hundred and fourteenth.

JOHN A. SHIELDS,
*Clerk.*

(Indorsed:) N. S. 4036, U. S. Supreme Court. Charles E. Miller, et al., ex., etc., plaintiffs in error, against James M. Constable et al., survivors, &c., defendants in error. Writ of error. Edward Mitchell, U. S. atty, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 14 day of Oct., 1889. W. B. Coughtry, attorney for defendants in error. U. S. circuit court. Filed Oct. 14, 1889, John A Shields, clerk.

3 Supreme court, city and county of New York.

AARON ARNOLD, RICHARD M. CONSTABLE, Jane M. Constable, Fred'k A. Constable, Joseph P. Baker, and Leonard Jacobs, plaintiffs,
*against*
CHESTER A. ARTHUR, COLLECTOR OF THE PORT of New York, defendant.

Summonds for a money demand on contract; om. not ser.

*To the above-named defendant:*

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the city and county of New York at the county court house in said city, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 111 Broadway, N. Y., within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of five thousand dollars, with interest from the sixteenth day of June, one thousand eight hun-
4 dred and seventy-four, besides the costs and disbursements of this action.

Dated Dec'r 16, 1874.

W. B. COUGHTRY,
*Plaintiffs' Attorney.*

(Endorsed): Supreme court. Aaron Arnold et al. vs. Chester A. Arthur. Summons W. B. Coughtry, plffs. atty. Due service of a copy hereof is hereby admitted this 17th day of Dec., 1874.

AARON ARNOLD ET ALS., PLAINTIFFS,
*vs.*
CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK, DEFENDANT.

The particulars of the plaintiffs' claim in this action are as follows: For excess of duties illegally exacted by the defendant from and paid under protest by the plaintiffs upon merchandise imported by Arnold, Constable & Co., viz:

| Port of entry. | Name of vessel. | Whence imported. | Description of merchandise. | Date of invoice. | Date of entry at custom-house. | Date of payment of duties. | Amount of duty illegally exacted. | Protest filed. | Date of appeal. | Date of Secretary's answer thereof. |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 1874. | 1874. | 1874. | | 1874. | 1874. | 1874. |
| New York | Russia | England | Crapes and vails | Apl. 4 | Apl. 18 | Apl. 18 | ..... | Aug. 24 | Sept. 11 | ..... |
| " | Abysinia | " | Hosiery and other articles worn by men, women, and children, made on frames and not otherwise proof for. | May 2 | May 13 | May 13 | ..... | " | " | ..... |
| " | C. of Montreal | " | | Feb. 19 | Mch. 9 | Mch. 9 | ..... | Sept. 3 | " 17 | ..... |
| " | " | " | | " | " | " | ..... | " 4 | " | ..... |
| " | " | " | | June 25 | July 6 | July 6 | ..... | " | " | ..... |

Yours, &c.,

W. B. COUGHTRY,
*Plaintiffs' Attorney*, 111 *Broadway, N. Y.*

GEORGE BLISS, Esq.,
*Defendant's Attorney*, 41 *Chambers Street.*

6 (Indorsed:) 4036. Supreme Court. A. Arnold versus C. A. Arthur, collector, &c. Bill of particulars. Sir: Please take notice that the within is the bill of particulars of the plaintiffs' claim in the above action, dated New York, Jan'y 28, 1875. Yours, &c., W. B. Coughtry, plaintiffs' attorney. To Geo. Bliss, esq., deft's att'y, 41 Chambers street. Due service of a copy is hereby acknowledged, and service of copy of complaint waived. New York, Jan. 30, 1875. Geo. Bliss, defendant's attorney.

7 The President of the United States of America, to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Chester A. Arthur, defendant, by Aaron Arnold & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 29th day of March, 1875, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 22nd day of March, in the year one thousand eight hundred and eighty-nine.

[L. S.] KENNETH G. WHITE, *Clerk.*

GEORGE BLISS,
*Defendant's Attorney.*

8 (Indorsed:) 4036. U. S. circuit court. Chester A. Arthur ads. Arnold. Copy certiorari. George Bliss, defendant's attorney. Sir: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Mar. 22, 1875. Yours, &c., George Bliss, defendant's attorney. To , plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, Mar. 22, 1875. W. B. Coughtry, plaintiff's attorney. 3, 22, '75.

9 Circuit court of the United States for the southern district of New York.

RICH'D ARNOLD & J. M. CONSTABLE, EXR. OF A. Arnold, dec., plaintiffs,
*against*
C. A. ARTHUR, COLLECTOR OF THE PORT OF New York, defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by W. B. Coughtry, their attorneys, come here into court, and suggest and give the court now here to understand and be informed, that heretofore, to wit, on the 17 day of Dec., 1874, an action was commenced in the supreme court of the State of New York, in and for the city and county of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the office of the clerk of the city and county of New York, he being also the clerk of the supreme court, on the 17 day of Dec., 1874.

That the defendant afterwards, by Geo. Bliss, esq., his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards, and on the 22 day of Mc'h, in the year of our Lord one thousand eight hundred and seventy-four, the said action was in due form of law removed, by writ of certiorari, for further prosecution and trial, into this court, according to the act of Congress in such case made and provided, and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs now, according to law, by their attorneys aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 17 day of Dec., 1874, at the City of New York, in the southern district of New York aforesaid, was indebted to the said plaintiffs in the sum of five thousand dollars, lawful money of the United States of America, for the money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant. And for other moneys by said plaintiffs, before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the plaintiffs in the further sum of five thousand dollars of lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs has hitherto wholly refused and still does refuse, to the damage of the said plaintiffs of five thousand dollars.

And therefore the plaintiffs bring suit, &c.

W. B. COUGHTRY,
*Pl'ffs' Att'y*, 111 *B'way.*

11 (Indorsed:) 4036. U. S. circuit court. Richard Arnold, ex., et al.. *vs.* C. A. Arthur, collector of the port of New York. Declaration, W. B. Coughtry, pl'ffs' att'y. Due service of a copy of within is hereby admitted. New York, June 10, 1876. Geo. Bliss.

12 United States circuit court, southern district of New York.

CHESTER A. ARTHUR
*ads.*
RICHARD ARNOLD & AL., EXRS., &c., and al. } Plea.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEORGE BLISS,
*Defendant's Attorney.*

To W. B. COUGHTRY, Esq.,
*Plaintiffs' Attorney.*

(Endorsed:) 4036. U. S. circuit court. Chester A. Arthur ads. Arnold. Plea. George Bliss, attorney for defendant.

You will please take notice that the plea of the defendant in the above cause of which the within is a copy was this day filed in the office
13 of the clerk of the U. S. circuit court for the southern district of New York. New York, June 24, 1876. Yours, &c., George Bliss, defendant's attorney. To W. B. Coughtry, esq., plaintiffs' attorney.

14 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court rooms in the post-office building in the city of New York on the 10th day of January, 1887.

JAMES M. CONSTABLE & AL., SURVIVORS, &C.,
*vs.*
CHESTER A. ARTHUR. } 4036.

On reading and filing the annexed affidavit of Magrane Coxe, duly sworn to the 10th day of January, 1887, and the annexed exemplified copy of letters testamentary granted by the court of common pleas for the city and county of New York to Charles E. Miller and Daniel G. Rollins on the 4th of December, 1886,

On motion of Stephen A. Walker, United States attorney and attorney for said Chester A. Arthur, it is ordered that the said Charles E. Miller and Daniel G. Rollins, executors of the last will and testament of said Chester A. Arthur, deceased, be, and they hereby are, substituted as parties
15 defendant in the above-entitled action in the place of said Chester A. Arthur, deceased, and that said action stand revived and continued as against them.

(Signed) WM. J. WALLACE.

16 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York on Wednesday, the 18 day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The honorable E. Henry Lacombe, circuit judge.

JAMES M. CONSTABLE ET AL., SURVIVING partners, &c.,
*vs.*
CHARLES E. MILLER ET AL., EXECUTORS. } 4036.

Now come the plaintiffs by Stephen G. Clarke, esq., their counsel, and move the trial of this cause.

Likewise come the defendants by William W. Smith, esq., assistant United States attorney, their attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the plaintiffs and the arguments of counsel the jury, by direction of the court, say that they find a verdict for the plaintiffs for eighty-one dollars and nineteen cents ($81.19).

On motion of Mr. Smith, the court grants a certificate of probable cause; parties to have a stay of sixty days to make a case, with leave to turn the same into a bill of exceptions.

An extract from minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

17 Circuit court of the United States for the southern district of New York.

JAMES M. CONSTABLE, FREDERICH A. CONSTABLE, Leonard Jacobs, & Joseph P. Baker, survivers of Arnold, Constable & Co.,
*vs.*
CHARLES E. MILLER ET ALS., EXECUTORS OF the estate of C. A. Arthur, dec'd. } No. 4036.

The issues of the above action having been brought on for trial before the Hon. E. Henry Lacombe and a jury at a trial term of said court, held at the city of New York, in said district, on the eighteenth day of April, 1888, and the issues having been tried and a verdict for the plaintiffs having been rendered, and the amount due under said verdict being found to be eighty-one dollars and nineteen cents, and the costs having been taxed and adjusted at forty-eight dollars and thirty-five cents: Now, on
18 motion of W. B. Coughtry, attorney for plaintiffs, it is ordered and a'judged that the plaintiffs recover of the defendant the sum of eighty-one dollars and nineteen cents as damages, and six dollars and eighty-one cents as interest upon said verdict from the date of said verdict until the entry of this judgment, and forty-eight dollors and thirty-five cents costs herein, taxed as aforesaid, amounting altogether to the sum of one hundred and thirty-six dollars and thirty-five cents.

Judgment signed this 12th day of October, A. D. 1889.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) 4036. U. S. circuit court. Jas. M. Constable et al., vs. C. E. Miller et als. Judgment record. W. B. Coughtry, plff's atty., 33 Pine st., New York City. U. S. circuit court. Filed Oct. 12, 1889. John A. Shields, clerk. 1 p. m.

19 United States circuit court, southern district of New York.

JAMES M. CONSTABLE, ET AL., SURVIVING partner of the firm of Arnold, Constable & Co., *vs.* CHARLES E. MILLER, ET AL., EXECUTORS, ETC. } N. S. 4036.

*Defendants' bill of exceptions.*

Afterwards, and on the 18th day of April, 1889, at a stated term of this court, held in the city of New York, the issues in this case came on for trial before the honorable E. Henry Lacombe, a judge of this court, and a jury duly empanelled to try the issues therein.

Counsel for the plaintiff, to maintain the issues on his part, introduced evidence tending to show that on May 13th, 1874, plaintiffs imported at the port of New York, per steamer Abyssinia, certain goods which were described upon the invoices thereof as ladies' white merino vests and men's white merino shirts. That upon these goods the defendants' testator, then collector of the port of New York, assessed duty at the rate of fifty cents per pound and thirty-five per cent ad valorem, less ten per cent, as manufactures composed wholly or in part of wool, which rate of duty was paid by the plaintiffs under protest as hereinafter stated, in
20 order to obtain possession of the goods so imported by them. As to the importations in question plaintiffs seasonably filed protests and appeals, and in due time commenced this action. The protest is as follows:

"NEW YORK, *Aug. 24th*, 1874.

"*To the Collector of Customs:*

"SIR: We hereby protest against the ascertainment and liquidation of duties at the rate of 90 per ct. of 50 cts. per lb. & 35 per cent ad valorem on the hosiery contained in our entry per Ab'syn*n*ia from Liverpool, May 13, 1874, claiming that said goods are only liable to duty at the rate of thirty per cent ad val. and five per cent additional thereto, under the 22nd section of the act of March 2nd, 1861, and 13th section of the act of July 14th, 1862, which impose said rate on 'caps, gloves, leggings, mit's, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, and not otherwise provided for,' less ten per cent under the second section of the act of June 6th, 1872.

"We pay the amount exacted from us in order to get possession of the goods and claim to have the difference refunded, and hereby give notice that we desire and intend the duplicate protest, filed herewith for transmission to the Secretary of the Treasury, to be an appeal to him from your decision on this and all future similar importations.

"ARNOLD, CONSTABLE & CO.,
"Per ALFRED DOUGLAS, JR., *Att'y.*"

21 Further to maintain the issues on their part plaintiffs introduced evidence tending to show that all goods of the character of those described in said invoices were at the time of the manufacture and shipment of such goods made upon frames. That the term "merino" was a well-known trade term, and was understood among merchants in this country to designate articles composed of wool and cotton which had been carded together. That the proportions of wool and cotton varied, the proportion of wool being sometimes ten and sometimes fifty per cent.

It was further shown on behalf of plaintiffs that the difference between the rate of duty assessed by the collector, and the rate of thirty-five per cent ad valorem, less ten per cent, as claimed by them, with interest from the date of its exaction to the date of trial, amounted to the sum of $81.19.

Plaintiffs then rested. Whereupon the counsel for defendant moved that a verdict be directed in favor of the defendants upon the ground that the goods in question, being manufactured articles composed in part of wool, were, by virtue of the provisions of section 2 of the tariff act of March 2, 1867, properly dutiable at the rate of fifty cents per pound and thirty-five per cent ad valorem, less ten per cent, by virtue of the provisions of the act of June 6th, 1872, and that the collector's classification and assessments were therefore in all respects correct, and should be sustained. The court denied this motion, to which ruling counsel for defendants then and there duly excepted, and the exception was duly noted and allowed.

22 Counsel for the plaintiffs then moved the court to direct a verdict in favor of the plaintiff, which motion the court granted, and thereupon directed a verdict for the plaintiffs for the sum of $81.19, to which ruling and direction counsel for the defendants then and there duly excepted, and the exception was duly noted and allowed.

The jury found a verdict in accordance with the direction of the court in favor of the plaintiffs in the sum of $81.19.

Inasmuch as the foregoing matters of law and fact, and the several exceptions taken, made, and allowed, do not appear upon the record of trial, therefore, upon the prayer of the defendants by their counsel, said judge has signed and sealed the foregoing as and for the bill of exceptions in this case, as of the 18th day of April, 1888.

E. HENRY LACOMBE.

Consented to.

W. B. COUGHTRY,
*Plff's Atty.*

23 (Indorsed:) 4036. U. S. circuit court, southern district of New York. James M. Constable et al., survivors, &c., versus Charles E. Miller et al., executors, &c. Defendants' bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, , 188 . , attorney for plaintiff. To , attorney for plaintiff. U. S. circuit court. F'l'd Oct. 9, 1889. John A. Shields, clerk.

SIR: You will please take notice that a , of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the clerk of the . Dated N. Y., , 18 . Yours, etc., , U. S. attorney, attorney for defendant. To , attorney for .

24 Supreme Court of the United States.

CHARLES E. MILLER & DANIEL G. ROLLINS, executors of Chester A. Arthur, plaintiffs in error,
*vs.*
JAMES M. CONSTABLE & AL., SURVIVORS OF Arnold, Constable & Co., defendants in error.

Assignment of errors.

Afterwards, to wit, on the third Monday of October term, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Edward Mitchell, U. S. att'y, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendants.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that (they) the said plaintiffs may be restored to all things which (they) (have) lost by occasion of said judgment, &c.

EDWARD MITCHELL,
*U. S. Att'y, Att'y for Pl'ffs in Error.*

25 (Indorsed:) N. S., 4036. United States Supreme Court. Charles E. Miller & al., executors, &c., plaintiffs in error, vs. James M. Constable & al., survivors, &c., defendants in error. Assignment of error. Edward Mitchell, U. S. att'y, attorney for pl'ffs in error. Due service of a copy of the within assignment of error is hereby admitted this 14th day of Oct., 1889. W. B. Coughtry, attorney for defendants in error. U. S. circuit court. Filed Oct. 14, 1889. John A. Shields, clerk.

26 Supreme Court of the United States.

CHARLES E. MILLER, ET AL., EX'RS, &C., plaintiffs in error,
*v.*
JAMES M. CONSTABLE ET AL., SURVIVORS, ETC., defendants in error.

Joinder in error.

And afterwards, to wit, on the third Monday of October term, 1889, in said term, the said defendant in error, by W. B. Coughtry, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

W. B. COUGHTRY,
*Attorney for Defendants in Error.*

27 (Indorsed:) 4036. United States Supreme Court. Charles E. Miller et al., ex'rs, etc., plaintiffs in error, vs. James M. Constable et al., survivors, etc., defendants in error. Joinder in error. W. B. Coughtry, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 22nd day of October, 1889. Edward Mitchell, U. S. att'y, attorney for def'd'ts, plaintiff in error. U. S. circuit court. Filed Oct. 22, 1889. John A. Shields, clerk.

28 UNITED STATES OF AMERICA, ss.

*To James M. Constable & al., survivors of Arnold, Constable & Co., greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of October term, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles E. Miller and Daniel G. Rollins, executors of Chester A. Arthur, plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated October 14th, 1889.

E. HENRY LACOMBE.

29 (Indorsed:) E. & A. A., 878. No. 4036. Supreme Court. Charles E. Miller & al., executors, &c., plaintiffs in error, against James M. Constable & al., survivors, &c., defendants in error. Citation. Edward Mitchell, U. S. attorney, attorney for plaintiffs in error. Due service of copy of the within citation is hereby admitted this 14 day of Oct., 1889. W. B. Coughtry, attorney for defendants in error. U. S. circuit court. Filed Oct. 14, 1889. John A. Shields, clerk.

(Indorsement on cover:) No. 274. Charles E. Miller and Daniel G Rollins, executors of Chester A. Arthur, deceased, late collector of the port of New York, plaintiffs in error, vs. James M. Constable et. al., survivors of Arnold, Constable & Company. S. New York. C. C. U. S. 13893. Filed October 28, 1889.

Note up to 155 US

154 US 493

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1889.**

No. 390. 5

SINGLETON M. ASHENFELTER, APPELLANT,

*vs.*

THE TERRITORY OF NEW MEXICO EX REL.: EDWARD C. WADE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

**FILED SEPTEMBER 5, 1887.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1889.

## No. 390.

---

SINGLETON M. ASHENFELTER, APPELLANT,

*vs.*

THE TERRITORY OF NEW MEXICO EX REL.: EDWARD C. WADE.

---

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Transcript from district court | 1 | 1 |
| Affidavit of relator | 1 | 1 |
| Motion for rule on defendant | 4 | 2 |
| Rule to show cause | 5 | 2 |
| Sheriff's return | 6 | 3 |
| Order granting leave to file information | 7 | 3 |
| Information | 7 | 3 |
| Motion for process | 13 | 6 |
| Order granting process | 14 | 6 |
| Summons | 14 | 6 |
| Sheriff's return | 16 | 7 |
| Stipulation as to plea to jurisdiction, &c. | 16 | 7 |
| Bill of exceptions | 18 | 8 |
| Motion to quash | 18 | 8 |
| Order overruling motion to quash | 20 | 9 |
| Answer | 20 | 9 |
| Motion for judgment | 24 | 11 |
| Order taking cause under advisement | 24 | 11 |
| Judgment | 25 | 11 |
| Motion for new trial, &c. | 27 | 12 |


---

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 17, 1889.

| | Original. | Print. |
|---|---|---|
| Stipulation as to jurisdiction | 28 | 13 |
| Affidavit in appeal | 28 | 13 |
| Order allowing appeal, &c. | 29 | 13 |
| Bond on appeal | 30 | 14 |
| Stipulation as to bond | 32 | 15 |
| Clerk's certificate | 33 | 15 |
| Order fixing time to file briefs and setting cause for hearing | 37 | 15 |
| Order setting cause for hearing | 37 | 16 |
| Hearing and submission | 38 | 16 |
| Judgment | 39 | 16 |
| Order granting appeal | 41 | 17 |
| Clerk's certificate | 42 | 17 |
| Petition of appeal | 43 | 18 |
| Bond on appeal | 49 | 19 |
| Opinion | 53 | 21 |
| Clerk's certificate | 57 | 49 |

1 *Record of Proceedings in the District Court, Third Judicial District, of the Territory of New Mexico, in Matter of Territory ex rel. Edward C. Wade vs. Singleton M. Ashenfelter.*

TERRITORY OF NEW MEXICO, }
*County of Sierra.* }

In the Matter of THE TERRITORY OF NEW MEXICO upon the Relation of EEWARD C. WADE *vs.* S. M. ASHENFELTER.

In the District Court of the Third Judicial District of the Territory of New Mexico, Sitting within and for the County of Sierra.

Be it remembered that heretofore, to wit, on the 10th day of November, A. D. 1885, came the said relator and made affidavit as follows, to wit:

TERRITORY OF NEW MEXICO, *County of Sierra:*

Edward C. Wade, of lawful age, being duly sworn, upon his oath states that heretofore, to wit, in the month of March, A. D. 1884, he was by the Governor of the Territory of New Mexico, in
2 due form of law, nominated for the office of district attorney for the third judicial district of said Territory; that such nomination was transmitted and submitted to the legislative council of said Territory and by said council confirmed, advised, and consented to, and that thereafter, on the 11th day of March, A. D. 1884, the said Governor, by and with the advice and consent of said legislative council, then in session at the capitol of said Territory, said advice and consent being given upon said nomination as aforesaid, appointed and commissioned him as such district attorney of said third judicial district in due form of law; that he thereupon and thereafter took the oath of office and entered upon his duties as such district attorney, and was legally possessed of and performed the duties of said office and exercised the powers and received the emoluments thereof from the time of his said appointment to and induction into said office as aforesaid until the ninth day of November, A. D. 1885; that from and after his induction into said office as aforesaid he never resigned, abandoned, or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said office since his appointment thereto been abolished or its tenure in anywise changed or altered, nor has his term expired; that by virtue of his said appointment he was (as he is advised and believes) legally entitled
3 to hold said office, perform the duties, and receive the emoluments thereof for the full term of two years and thereafter until his successor in said office should be lawfully appointed and qualified. He further states that on the 9th day of November, A. D. 1885, one Singleton M. Ashenfelter, illegally claiming said office under color of an unauthorized, illegal, and void appointment (as affiant is advised and believes), made long after the date of affiant's

appointment by the Governor of the Territory of New Mexico, without the advice and consent of the legislative council of said Territory and at a time when said council was not in session, usurped, intruded into, and unlawfully (as affiant is advised and believes) held said office of district attorney for said third judicial district of the Territory of New Mexico and still does unlawfully (as affiant is advised and believes) held said office, perform and execute the powers and duties thereof, and claim the emoluments of the same, and that since the said ninth day of November, A. D. 1885, the said Singleton M. Ashenfelter unlawfully (as affiant is advised and believes) excluded and still excludes this affiant from said office and has refused and still refuses to allow this affiant to hold and execute the said office or to receive the emoluments thereof.

4 Affiant further says that he is desirous that the title of this affiant and of said Ashenfelter to said office and the right to exercise its functions and receive its emoluments should be judiciously inquired into and determined, and that to that end a rule may be made, upon the facts herein stated, upon motion of the attorney general of the Territory of New Mexico for said Territory, upon the said Singleton M. Ashenfelter to show cause, if any he hath, why leave should not be given to file an information in the nature of a *quo warranto* in behalf of said Territory upon the relation of this affiant, the said Edward C. Wade, against the said Singleton M. Ashenfelter for usurping, intruding into, and unlawfully holding and exercising said office as aforesaid.

(Signed) EDWARD C. WADE.

Subscribed and sworn to before me this 10th day of November, A. D. 1885.

GEORGE R. BOWMAN, *Clerk.*

And afterwards, to wit, on the 10th day of November, A. D. 1885, came said plaintiff, by William Breeden, attorney general of said Territory of New Mexico, and moves the court here for a rule upon said S. M. Ashenfelter; which motion is in words and figures as follows, to wit:

Territory of New Mexico, 3rd Judicial District Court, County of Sierra. November, A. D. 1885, Term.

5 Now comes William Breeden, attorney general for the Territory of New Mexico, and upon the affidavit of Edward C. Wade filed herewith and upon facts therein stated moves the court for a rule upon Singleton M. Ashenfelter to show cause, if any he hath, why the said attorney general should not have leave to file an information in the nature of a *quo warranto* in this court on behalf of the Territory of New Mexico on relation of the said Edward C. Wade against the said Singleton M. Ashenfelter, for having illegally usurped and intruded into and having unlawfully exercised the functions of and held and still unlawfully holding and executing the office of district attorney for the 3rd judicial district of the Territory of New Mexico.

WM. BREEDEN,
*Attorney General for the Territory of New Mexico.*

And thereupon, afterwards, to wit, on the 10th day of November, A. D. 1885, a rule issued in the words and figures as follows, to wit:

In the Matter of a Motion for a Rule on SINGLETON M. ASHENFELTER.

Upon reading and filing the affidavit of Edward C. Wade and upon reading and filing the motion of Wm. Breeden, attorney general for the Territory of New Mexico, based upon said affidavit, it *it* is ordered that Singleton M. Ashenfelter show cause before the court on Tuesday morning, November 12th, at 10 o'clock, if aught
6 he hath, why the attorney general should not have leave to file an information in the nature of a *quo warranto* in this court, on behalf of the Territory of New Mexico on relation of Edward C. Wade against the said Singleton M. Ashenfelter, for having illegally usurped and intruded into and having unlawfully exercised the functions of and held and is still unlawfully holding and exercising the office of district attorney for the third judicial district of the Territory of New Mexico.

On which said rule the sheriff of Sierra county, N. M., on the 12th day of November, made the following return, to wit:

TERRITORY OF NEW MEXICO, } ss:
*County of Sierra,* }

This certifies that I served a true copy of the within order (duly certified to be a true copy under the hand of the clerk of the 3rd judicial district court and under the seal of said court) upon the said Singleton M. Ashenfelter, therein named, at the county of Sierra aforesaid, on the morning of the 11th day of November, A. D. 1885.

Witness my hand this 12th day of November, A. D. 1885.

THOMAS MURPHY, *Sheriff.*

And afterwards, to wit, on the 11th day of November, 1885, the same being the 3rd day of said regular November term, the following further proceedings were had in said cause, to wit:

7 In the Matter of the Rule on SINGLETON M. ASHENFELTER.

And now comes Wm. Breeden, Esq., attorney general of the Territory of New Mexico, and moves the court for leave to file an information in the nature of a *quo warranto* on the relation of Edward C. Wade against Singleton M. Ashenfelter for unlawfully usurping, intruding into, and holding the office of district attorney for the third judicial district for the Territory of New Mexico and for having unlawfully exercised and still unlawfully exercising the powers and functions of said office; and it appearing to the court that the rule to show cause why such leave should not be granted has been duly served on said Singleton M. Ashenfelter, being present in court and making no answer to said rule and saying nothing in

opposition to said motion, the same is sustained by the court. It is therefore considered by the court that said motion be, and hereby is, sustained, and that the said attorney general be, and is hereby, granted leave to file such information as above stated and recited.

And afterwards, to wit, on the 12th day of November, A. D. 1885, came said plaintiff, by said Wm. Breeden, attorney general for said Territory of New Mexico, and filed an information herein in words and figures as follows, to wit:

8 Territory of New Mexico, Third Judicial District Court, County of Sierra. November Term, A. D. 1885.

Be it remembered that Wm. Breeden, attorney general for the Territory of New Mexico, who prosecutes for the Territory in this behalf on relation of Edward C. Wade, of the said third judicial district of said Territory, comes into the said district court and gives the court here to understand and be informed that on the 11th day of March, A. D. 1884, the said Edward C. Wade, relator as aforesaid, was duly and legally appointed to the office of district attorney for the third judicial district of the Territory of New Mexico by the Governor of said Territory, by and with the advice and consent of the legislative council thereof; that the said Edward C. Wade thereupon took the oath of office as such district attorney required by law and entered into and upon the duties of said office, and was lawfully possessed thereof and lawfully exercised the powers, performed the duties, and received the emoluments appertaining to the same, and continued to have, hold, and enjoy the said office and to exercise the powers, perform the duties, and receive the emoluments thereof from the time of his appointment and induction into said office until the ninth day of November, A. D. 1885.

9 That from and after his appointment to said office the said Edward C. Wade never abandoned or resigned said office or in any manner forfeited the same, nor has the said office ever been abolished or the tenure thereof changed by law, nor has the said Edward C. Wade ever been removed or displaced from said office by the judgment of any court or by any other lawful authority or in any lawful way, nor has the term of office of the said Edward C. Wade expired; and that on the said ninth day of November, A. D. 1885, one Singleton M. Ashenfelter, well knowing the premises aforesaid, did unlawfully usurp the said office of district attorney for the third judicial district of the Territory of New Mexico aforesaid, at the third judicial district, and did enter upon and into the exercise of all the powers and duties of said office, and by such unlawful usurpation did then and there become possessed of the said office, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory; and the said attorney general upon the relation of the said Edward C. Wade further gives the court here to understand and be informed that

10 the said Singleton M. Ashenfelter, on the ninth day of November, A. D. 1885, at the third judicial district aforesaid, did

unlawfully hold the office of district attorney for the third judicial district of the Territory of New Mexico, and from thence hitherto hath and still doth unlawfully hold the said office and exercise the powers and claim the emoluments thereof, the said Edward C. Wade, the relator, being all that time and now the lawfully appointed and qualified district attorney for said third judicial district of said Territory and lawfully entitled to the possession of said office and to receive the emoluments thereof, as stated in the first count of this information, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico; and the said attorney general, upon the relation of the said Edward C. Wade, further gives the court here to understand and be informed that on the ninth day of November, A. D. 1885, at the said third judicial district of said Territory of New Mexico, the said Singleton M. Ashenfelter did unlawfully exercise the powers and functions of the office of district
11 attorney for the third judicial district of the Territory of New Mexico and from said day hath exercised and still doth exercise the powers and functions of said office without any lawful authority, the said Edward C. Wade being on said ninth day of November, A. D. 1885, the district attorney for said third judicial district of said Territory *Territory* and still continuing to be and remain such district attorney, as in the first count of this information stated, contrary to the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico; and the said attorney general, upon the relation of the said Edward C. Wade, further gives the court here to understand and be informed that on the ninth day of November, A. D. 1885, at the third judicial district aforesaid, the said Singleton M. Ashenfelter, by the unlawful intrusion in the first count of this information stated, did become possessed of the said office of district attorney for said third judicial district and hath hitherto continued to have and hold and to exercise the powers and duties of said office contrary to the law
12 and the rights of said Edward C. Wade, who at the time of said intrusion was and still is the lawful district attorney for said district, as stated in the first count of this information, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico. The said attorney general therefore prays the consideration of the court here of the premises; that the said Singleton M. Ashenfelter be required to make answer hereunto and to that end the proper orders be made and the proper process issue; that judgment be rendered against him ousting him from and dispossessing him of said office, and that the possession of said office and the title to the same, with the right to exercise the powers, perform the duties, and receive the emoluments thereof, be adjudged to the said Edward C. Wade; and the said attorney general prays that proper process returnable into this court issue to the said Singleton M. Ashenfelter commanding him by a certain day and under a certain penalty to appear in this

court, then and there to answer the premises and stand to,
13 abide, and perform the orders and judgment of the court.

WM. BREEDEN,
*Attorney General for the Territory of New Mexico.*

And afterwards, to wit, on the 13th day of November, A. D. 1885, came the plaintiff in said case, by Wm. Breeden, Esq., attorney general therefor, and moves the court here for process to issue in said cause; which said motion is in words and figures as follows:

Territory of New Mexico, Third Judicial District Court, County of Sierra. November Term, A. D. 1885.

THE TERRITORY OF NEW MEXICO on Relation of EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER. } Unlawfully Holding Office.

And now comes Wm. Breeden, attorney general for the Territory of New Mexico, and moves the court to award and direct process upon the information herein to compel the appearance of the said defendant, to be now issued, returnable into this court forthwith, and that the said defendant be ruled and required to answer said information or plead thereto by such early day during the present term as the court shall designate.

WM. BREEDEN,
*Attorney General for the Territory of New Mexico.*

14 And afterwards, to wit, on the 17th day of November, A. D. 1885, the following proceedings were had and entered of record, to wit:

THE TERRITORY on Relation of EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER.

The motion for the award of process herein having been argued and submitted to the court at a former day of this term, and the court, being now sufficiently advised in the premises, sustains said motion. It is therefore ordered by the court that process, directed to said defendant and requiring his appearance to said information, be issued by the clerk of this court, returnable to-morrow morning, at ten o'clock; whereupon, on the 17th day of November, A. D. 1885, writ issued to said S. M. Ashenfelter in words and figures as follows, to wit:

The Territory of New Mexico to Singleton M. Ashenfelter, Greeting:

Whereas Wm. Breeden, attorney general for the Territory of New Mexico on the relation of Edward C. Wade, hath filed in the district court for the third judicial district of the Territory of New Mexico, sitting within and for the county of Sierra, by leave of the court, an

information in the nature of a *quo warranto*, alleging and
15 charging that you, the said Singleton M. Ashenfelter, have unlawfully usurped, intruded into, and held the office of district attorney for the third judicial district of the Territory of New Mexico and unlawfully exercised the powers and functions thereof, and that you, the said Singleton M. Ashenfelter, still unlawfully hold said office and exercise the powers and functions thereof without any authority of law and to the exclusion of said Edward C. Wade, who, it is alleged, is the legally appointed district attorney for said district and lawfully entitled to the possession of said office and to hold and enjoy and to exercise the powers and functions thereof: Therefore you, the said Singleton M. Ashenfelter, are hereby commanded that, laying all other matters and things aside, you do appear at 10 o'clock a. m. on Wednesday, November 18th, 1885, before the said district court, now sitting in said county of Sierra, at the court-house of said county, then and there to answer unto said information concerning the matters therein alleged and charged against you and observe what the said court shall direct in this behalf; and this do under penalty of the law and on pain of
16 such judgment and other *other* process as said court shall award.

Witness the Hon. Wm. F. Henderson, associate justice of the supreme court of the Territory of New Mexico and judge of the third judicial district court thereof, and the seal of said court, this the 17th day of November, A. D. 1885.

[SEAL.] GEORGE R. BOWMAN, *Clerk.*

On which said writ the sheriff of Sierra county, N. M., on the 17th day of November, 1885, made the following return and filed said writ, with said return, with the clerk:

I certify that I served the within writ on the within-named Singleton M. Ashenfelter, at the county of Sierra, this the 17th day of November, A. D. 1885, at 10 o'clock a. m.

THOMAS MURPHY,
*Sheriff of Sierra County.*

And afterwards, to wit, on the 18th day of November, A. D. 1885, came the plaintiff and defendant in said cause, and filed herein stipulation in words and figures as follows, to wit:

THE TERRITORY OF NEW MEXICO, *County of Sierra*, } *ss*:

In the District Court of the Third Judicial District. November Term, 1885.

THE TERRITORY OF NEW MEXICO on the Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.

17 In order to expedite and obtain as speedy determination of this cause and to save the defendant all of the rights that

he may have touching the jurisdiction of the court over his person herein, and that none of them may be waived, it is hereby agreed that the plea to the jurisdiction and the answer may be filed and considered at the same time without the general appearance which may be entered for the purpose of such answer being considered as giving jurisdiction over the person of the defendant, but the question as to whether the court acquired jurisdiction over the person of the defendant by reason of a process of summons issued by the court during the present term of this court and made returnable to the present term of this court may be considered the same as if no general answer had been made, but only a special appearance for that purpose entered November 18, 1885.

WM. BREEDEN,
*Attorney General.*
G. G. POSEY,
IDUS L. FIELDER,
W. T. THORNTON,
*Att'ys for Defendant.*

And afterwards, to wit, on the 1st day of December, A. 18 D. 1885, the said defendant filed in said clerk's office his bill of exceptions, which was and is in words and figures following, to wit:

*Bill of Exceptions.*

TERRITORY upon Relation of EDWARD C WADE
*vs.*
SINGLETON M. ASHENFELTER. } Fraudulently Holding Office.

In the District Court for the 3rd Judicial District of the Territory of New Mexico within and for the County of Sierra. November Term, 1885.

And now, on this 18th day of November, 1885, being the 9th day of said term, comes the defendant herein, appearing specially for this purpose and no other, and moved the court here to quash the process herein; which said motion is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, } *ss:*
*County of Sierra,* }

In the District Court of the 3rd Judicial District of the Territory of New Mexico. November Term, A. D. 1885.

THE TERRITORY OF NEW MEXICO on the Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.

Now, at this day, comes the above-named Singleton M. Ashen-

felter in his own proper person and enters his appearance
19 herein for the purposes of this motion and for no other purpose, and moves the court to dismiss the information filed by the relator in this cause here and quash the process issued for the following reasons:

First. Because the court has no jurisdiction over the subject-matter and no power to proceed by information, and can only proceed to try the right of office by the original writ of *quo warranto*, and not by information in the nature of a *quo warranto*.

Second. The process issued in this cause is an original writ issuing out of this court, and could only be made returnable at the next succeeding term after the same was issued, whereas the writ issued in this case was made returnable at the same term at which it was issued.

Third. Because the court, as appears upon the face of the information and the writ, has no jurisdiction either of the subject-matter in controversy or of the person of the defendant.

(Signed) SINGLETON M. ASHENFELTER.

Whereupon, after argument of counsel for both parties, the said motion was by the court overruled, and the judgment of the court thereon is entered of record in words and figures as follows, to wit:

20 TERRITORY OF NEW MEXICO on Relation of E. C. WADE }
*vs.*
SINGLETON M. ASHENFELTER. }

Now comes on to be heard the motion of the said defendant to quash the writ and dismiss the proceeding herein for reasons stated in said motion, and the same, being argued by counsel, is overruled by the court.

It is therefore considered by the court here that the said motion be, and the same is hereby, overruled and denied.

To which ruling of the court the defendant did then and there except.

And afterwards, to wit, on the 18th day of November, A. D. 1885, comes said defendant, by his attorney, I. L. Fielder, and under the stipulation hereinbefore set forth filed his answer herein; which said answer is in words and figures as follows, to wit:

THE TERRITORY OF NEW MEXICO, } *ss:*
*County of Sierra,* }

In the District Court oft he 3rd Judicial District. November Term, 1885.

THE TERRITORY OF NEW MEXICO on Relation of E. C. WADE }
*vs.*
SINGLETON M. ASHENFELTER. }

Now, at this day, comes the said defendant, by his attorney,
21 and for answer to the information filed in this cause says that it is true and that he admits that on the 11th day of

March, A. D. 1884, the relator, Edward C. Wade, was duly and legally appointed to the office of district attorney for the 3rd judicial district of the Territory of New Mexico by the Governor of said Territory, by and with the advice and consent of the legislative council thereof; that the said Edward C. Wade took the oath of office of such district attorney required by law and entered into and upon the duties of said office, and was lawfully possessed thereof and lawfully exercised the powers, performed the duties, and received the emoluments appertaining to the same, and continued to have, hold, and enjoy the said office and to exercise the powers, perform the duties, and receive the emoluments thereof from the time of his appointment and induction into said office until the 9th day of November, 1885, and that he never abandoned said office; but defendant denies that said relator never in any way forfeited said office, and denies that said relator has never been removed from said office by any lawful authority or in any lawful way, but defendant alleges the truth to be that said office is a district office
22 created by an act of the Legislative Assembly of the Territory of New Mexico, wherein it is provided that the Governor shall, by and with the advice and consent of the legislative council, appoint a district attorney to fill said office during the session of the Legislative Assembly, and wherein it is otherwise provided that in all cases wherein the Governor is or may be authorized by law to make appointments by and with the advice and consent of the legislative council he is hereby authorized to make tempor-y appointments during the recess of the Legislative Assembly to continue until the meeting of the same; which said acts of the Legislative Assembly are unrepealed, but are in full force and operation at this time.

Defendant admits that on the 9th day of November, 1885, he entered upon the duties of said office of district attorney, but denies that such entry was unlawful or usurpation on his part.

He admits that he entered into the exercise of all the powers and duties of said office and became possessed of said office and is now holding and exercising the same, but denies that such holding is unlawful, but alleges the truth to be that heretofore, to wit, on
23 the 28th day of October, A. D. 1885, his excellency Edmund G. Ross, Governor of the Territory of New Mexico, by virtue of the authority in him vested by virtue of his said office as Governor of New Mexico, did suspend the said Edward C. Wade from the said office and appoint and commission this defendant to fill the same; that said defendant afterwards, to wit, on the 31st day of October, A. D. 1885, duly qualified and took the oath of office of said district attorney of said third judicial district and entered into the same, and has since continued to hold the same, to perform the duties thereof, and to receive the emoluments therefrom under and by virtue of said appointment.

Defendant denies that the said Edward C. Wade is still entitled to said office and to have and receive the emoluments thereof and to perform the duties thereof.

And the defendant, having fully answered all the material allega-

tions in said information and having shown a title to said office by lawful authority, prays that he may be discharged hence with his reasonable expense laid out and expended.

I. L. FIELDER,
W. T. THORNTON,
G. G. POSEY,
*Att'ys for Def't.*

24 And afterwards, to wit, on the 19th day of November, A. D. 1885, the motion for judgment, of which the following is a copy, was filed in the office of the clerk of said court:

Territory of New Mexico, 3rd Judicial District Court, County of Sierra. November Term, A. D. 1885.

THE TERRITORY OF NEW MEXICO on the *Motion* of EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER. } Unlawfully Holding the Office of District Attorney.

And now comes Wm. Breeden, attorney general for the Territory of New Mexico, and submits this case and moves for judgment herein upon the information and the answer of said defendant, and that judgment be rendered ousting the said defendant from the said office of district attorney for the third judicial district of the Territory of New Mexico and in favor of the said relator for the possession of said office and the right to hold the same.

WM. BREEDEN,
*Attorney General.*

And be it further remembered that afterwards, to wit, on the eleventh day of said term, the same being 20th day of November, A. D. 1885, the following further proceedings were had, to wit:

25 THE TERRITORY OF NEW MEXICO on the Relation of EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER.

This cause having been argued by counsel upon the information herein, the answer of the said defendant thereto, and the motion of Wm. Breeden, Esq., attorney general, for judgment thereon on the tenth — of the present term of this court, and having been then submitted to the court and the court, not being sufficiently advised in the premises, took the same under advisement, and the entry of these proceedings having been omitted from the record of said tenth day of this term, the same is now here made *nunc pro tunc* as of said day.

And afterwards, to wit, on the 12th day of said term, the same being the 21st day of November, A. D. 1885, the following further proceedings were had in said cause in said court, to wit:

THE TERRITORY OF NEW MEXICO on the Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.
} Unlawfully Holding the Office of District Attorney.

This case having been argued and submitted at a former day of this term upon the information herein, the answer of the said defendant thereto, and the motion of Wm. Breeden, attorney general,
26 for judgment therein, and the court having taken the same under advisement and being now sufficiently advised in the premises as to what judgment it should render, it is considered and adjudged by the court that the said Singleton M. Ashenfelter is not entitled to the possession of said office of district attorney of the 3rd judicial district of the Territory of New Mexico, and that he unlawfully holds the same and exercises the powers and functions thereof without authority of law; and it is further considered and adjudged that the said relator, Edward C. Wade, is the lawful district attorney for said 3rd judicial district of said Territory and lawfully entitled to the possession of said office and to exercise the powers, perform the duties, and receive the emoluments thereof; and it is further considered and adjudged that the said Singleton M. Ashenfelter surrender said office and the possession thereof to said Edward C. Wade, and the said Singleton M. Ashenfelter be, and he hereby is, ousted therefrom; and it is further considered and adjudged that Singleton M. Ashenfelter pay the cost of this proceeding, and that execution issue therefor; to which said judgment and decision the said de-
27 fendant does here and now except and prays that the said exception may be entered of record; and it is hereby ordered that said entry be made; and now the said defendant files his motion for a new trial and in arrest of judgment, which said motions are submitted to the court and overruled; to which ruling of the court defendant, by counsel, excepts.

Following is a copy of the motion for a new trial and in arrest of judgment, with stipulation attached, to wit:

In the District Court, 3rd Judicial District, New Mexico, in and for the County of Sierra. Nov. Term, 1885.

TERRITORY OF NEW MEXICO on Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.

And now, on this day, comes the defendant, by his attorney, and moves the court to set aside the findings herein and to grant a new hearing, because—

1st. The said findings are not in accordance with law.

2nd. Because said findings are contrary to law.

And further moves the court to arrest the judgment herein—

1st. Because the court cannot hear or determine this question upon the proceeding in the nature of a *quo warranto*.

28 2nd. Because this court has no jurisdiction of the subject-matter.

IDUS L. FIELDER,
*Attorney for Defendant.*

It is here agreed that all questions as to the jurisdiction of the court in said cause and exceptions to the findings of the court are reserved and may be considered in the supreme court without specific-ly setting them forth in the foregoing motion.

November 21st, 1885.

WM. BREEDEN,
*Attorney for Relator, Edward C. Wade.*
IDUS L. FIELDER,
*Attorney for Defendant Ashenfelter.*

And be it further remembered that afterwards, to wit, on the 21st day of November, A. D. 1885, an affidavit in appeal, of which the following is a copy, was filed in said cause:

In the District Court of the Third Judicial District of the Territory of New Mexico, Sitting within and for the County of Sierra. November Term, 1885.

In the Matter of the TERRITORY OF NEW MEXICO upon Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.

Upon appeal Singleton M. Ashenfelter, defendant, appellant in above-entitled cause, being duly sworn, upon his oath says that his appeal herein is not taken for the purpose of vexation or de-
29 lay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the court.

SINGLETON M. ASHENFELTER.

Subscribed and sworn to before me, at Hillsboro, N. M., this 21st day of November, 1885.

GEORGE R. BOWMAN, *Clerk.*

And be it further remembered that afterwards, to wit, on the 21st day of November, 1885, the same being the twelfth day of said November term in and for said county of Sierra, the following further proceedings were had and entered of record in said cause, to wit:

TERRITORY OF NEW MEXICO on Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.
Information in Nature of *Quo Warranto.*

This cause having been determined at the present term of this court, and it appearing to the court that an appeal has been properly taken herein, that proper affidavit has been filed, required by law, and that a duly approved bond, sufficient in form and with proper sureties and conditions as required by law, has been filed herein, it is ordered that a stay of execution and a suspension of the operation of the judgment be, and is hereby, granted in
30 said cause, and that an appeal be allowed and that a transcript be sent to the supreme court.

And afterwards, to wit, on the 21st day of November, A. D. 1885, comes the defendant, S. M. Ashenfelter, by Idus L. Fielder, Esq., his counsel, and files his bond in appeal in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Singleton M. Ashenfelter, as principal, and George F. Patrick and Idus L. Fielder, as sureties, are held and firmly bound unto the Territory of New Mexico for the use and benefit of Edward C. Wade in the penal sum of eight hundred dollars; for the payment of which, well and truly to be made, we do jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Signed with our hands and sealed with our seals this 21st day of November, 1885. The condition of the above obligation is such that whereas a judgment has this day been rendered in the district court of the 3rd judicial district of the Territory of New Mexico, sitting within and for the county of Sierra, against the said Singleton M. Ashenfelter in a case wherein the said Territory of New Mexico upon the relation of the said Edward C. Wade is plaintiff and the
31 said Singleton M. Ashenfelter is defendant, involving the right to the office of district attorney for the third judicial district of New Mexico, from which said judgment the said Singleton M. Ashenfelter has this day taken an appeal to the supreme court of the said Territory of New Mexico: Now, therefore, if the said Singleton M. Ashenfelter shall well and truly prosecute said appeal and abide whatever judgment and decision the said supreme court may render thereon and pay all costs thereof which may be adjudged against him and pay to the said Edward C. Wade all damages which may accrue to him by reason of said appeal, in event said judgment shall be affirmed, then this obligation to be null and void; otherwise to be of full force and effect.

SINGLETON M. ASHENFELTER. [SEAL.]
GEORGE F. PATRICK. [SEAL.]
IDUS L. FIELDER. [SEAL.]

TERRITORY OF NEW MEXICO, }
*County of Sierra,* } ss:

Before me, George R. Bowman, clerk of the district court for the 3rd judicial district of the Territory of New Mexico, this day came Singleton M. Ashenfelter, the principal, and George F. Patrick and Idus L. Fielder, sureties, on the above and foregoing bond,
32 and who are all personally known to me, and they severally acknowledged to me that they executed the same as their joint and several act and deed for the uses and purposes therein set forth; and the said George F. Patrick and Idus L. Fielder, sureties, being duly sworn, upon his oath says each for himself that he is worth the sum of money set opposite his name below above all his just debts and liabilities and property exempt by law from execution.

GEORGE F. PATRICK, $800.00.
IDUS L. FIELDER, $800.00.

In testimony whereof I have hereunto set my official hand and seal of said court, at Hillsboro, N. M., this the 21st day of November, 1885.

GEORGE R. BOWMAN, *Clerk.*

The foregoing bond as to form and sufficiency of sureties is hereby approved.

W. F. HENDERSON, *Judge, &c.*

Following is a copy of the stipulations in pursuance of which the foregoing bond *bond* was made:

TERRITORY OF NEW MEXICO upon Relation of EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER. } Information in the Nature of *Quo Warranto.*

33 In District Court, 3d District.

It is hereby stipulated in above cause that in event judgment be rendered in district court against defendant in above-entitled cause his appeal and supersedeas bond may be fixed at eight hundred dollars, & that if judgment in said district court go against plaintiff his bond upon appeal may be fixed at two hundred dollars.

SINGLETON M. ASHENFELTER.
WM. BREEDEN, *Attorney General.*

TERRITORY OF NEW MEXICO:

Third Judicial District Court.

I, W. J. Joblin, clerk of said court, do hereby certify that the above and foregoing is a true and correct copy of the pleadings and record in case of Territory upon relation of E. C. Wade *vs.* S. M. Ashenfelter, appealed to supreme court of Territory.

In witness whereof I have hereunto set my hand and the seal of said court this 5th day of December, 1885.

[SEAL.] (S'g'd) W. J. JOBLIN, *Clerk.*

34 & 35 TERRITORY OF NEW MEXICO:

Supreme Court.

Be it remembered that at the January, 1886, term of the said supreme court in and for said Territory the following, among other, proceedings were had:

36 & 37 TERRITORY OF NEW MEXICO *ex rel.* E. C. WADE, Appellee, *vs.* SINGLETON M. ASHENFELTER, Appellant. } Appeal from Sierra County.

Now comes said relator, by his attorney, Wm. Breeden, Esquire,

and enters his appearance herein, and thereupon it is ordered that said appellant be, and hereby is, given until next Monday to file his brief herein; that said appellee and relator be, and he hereby is, given until the second Thursday of this term to file his brief herein, and that this cause be, and hereby is, set down for argument at the incoming of court on the second Friday of the present term.

TERRITORY OF NEW MEXICO *ex rel.* EDWARD C. WADE, Appellee,
*vs.*
SINGLETON M. ASHENFELTER, Appellant.
} Appeal from Sierra County.

By agreement of said parties, by their respective attorneys, it is ordered that this cause be set down for argument at the incoming of court on to-morrow morning.

38 TERRITORY OF NEW MEXICO *ex rel.* EDWARD C. WADE, Appellee,
*vs.*
SINGLETON M. ASHENFELTER, Appellant.
} Appeal from Sierra County.

This cause, coming on to be heard upon the record and the briefs of said parties filed herein, is argued by Idus L. Fielder and W. B. Childers, Esquires, in behalf of said appellant, and by William Breeden, Esquire, in behalf of said appellee.

THE TERRITORY OF NEW MEXICO *ex rel.* E. C. WADE, Appellee,
*vs.*
SINGLETON M. ASHENFELTER, Appellant.
} Appeal from Sierra County.

This cause, again coming on to be heard upon the record and the briefs of said parties filed herein, is further argued on behalf of siad appellee by William Breeden and by John H. Knæbel, Esquires, and in behalf of said appellant, by H. L. Warren, Esquire, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

39 And afterwards, to wit, at the January, 1887, term of the said supreme court in and for said Territory the following, among other, proceedings were had:

THE TERRITORY OF NEW MEXICO *ex rel.* EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.
} *Quo Warranto* Appeal from District Court, Sierra County.

This cause having been submitted to and taken under advisement by the court at a former term, the court now, being sufficiently advised in the premises, announces its decision by Chief Justice Long affirming the judgement of the court below for reasons stated in the opinion on file, Associate Justice Brinker concurring. It is therefore considered and adjudged by the court that the judgement in this cause of the third judicial district court sitting within and

for the county of Sierra, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith the said defendant, Singleton M. Ashenfelter, is not entitled to the possession of the said office of district attorney of the third judicial district of the Territory of New Mexico, and that he unlawfully holds the same and exercises the powers and functions thereof
40 without authority of law; that said relator, Edward C. Wade, is the lawful district attorney for said third judicial district of said Territory and lawfully entitled to the possession of said office and to exercise the powers, perform the duties, and receive the emoluments thereof; and it is further considered and adjudged that the said Singleton M. Ashenfelter surrender said office and the possession thereof to said Edward C. Wade, and the said Singleton M. Ashenfelter be, and he hereby is, ousted therefrom; and it is further considered and adjudged that Singleton M. Ashenfelter pay the costs of this proceedings, as well in the lower court as in this court, to be taxed, and that execution issue therefor; and it appearing to the court that said respondent, Singleton M. Ashenfelter, as principal, and George F. Patrick and Idus L. Fielder, as securities, entered into a recognizance unto the Territory of New Mexico for the use of Edward C. Wade in the penal sum of eight hundred dollars, conditioned as provided by law for the stay of execution of said judgement until the judgement and decision of this court in this cause, tt is further considered and adjudged by the court that the
41 Territory of New Mexico for the use of Edward C. Wade recover of said Singleton M. Ashenfelter, George F. Patrick, and Idus L. Fielder the sum of eight hundred dollars, the penalty of said bond and the costs as aforesaid, and that execution issue therefor.

TERRITORY OF NEW MEXICO *ex rel.* EDWARD C. WADE, Appellee,
*vs.*
SINGLETON M. ASHENFELTER, Appellant.
} Appeal from Third Judicial District, Sierra County.

Now comes said defendant and appellant and moves the court to grant him an appeal from the judgement of this court to the Supreme Court of the United States for reasons stated in his petition on file, and said motion being submitted to the court, and the court, being sufficiently advised in the premises, grants said motion. It is therefore ordered by the court that said Singleton M. Ashenfelter, appellant herein, be, and hereby is, granted an appeal from the judgement of this court in this cause to the Supreme Court of the United States; and — is further ordered that the execution of said
42 judgement be, and hereby is, stayed for the period of sixty days, and that if said appellant file an appeal bond herein within sixty days from to-day (being the 3rd day of February, 1887) in the sum of four thousand dollars, conditioned that he will prosecute his appeal with effect and without delay to final judgement, and that if the judgement of the supreme court of the Territory of New

Mexico be affirmed he will pay all damages and costs occasioned by this appeal which may be recovered before any court of competent jurisdiction, in that case the execution of said judgement shall be further stayed until the decision of the said Supreme Court of the United States is had in the premises.

TERRITORY OF NEW MEXICO, }
*County of Santa Fe.* }

Supreme Court.

I, —— ——, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true copy of all the journal entries in said cause.

Witness my hand and the seal of said court this the 18th day of June, A. D. 1887.

Seal Supreme Court, Territory of New Mexico.

R. M. FOREE, *Clerk.*

43 The petition for appeal hereinabove referred to, filed in the office of the clerk of the supreme court of the Territory of New Mexico on the 2d day of February, 1887, after setting forth the record of the district court as above and the appeal as taken to said supreme court of the Territory, is in words and figures as follows, to wit:

That upon the appeal so taken and allowed in said proceeding at the January term, A. D. 1887, of the supreme court of the said Territory of New Mexico, such proceedings were had in said court that on, to wit, the — day of January, A. D. 1887, a final order and judgment was made and entered therein, wherein it was in substance determined and adjudged by said supreme court that the authority exercised by the Governor of the Territory of New Mexico under the provisions of an act of the Congress of the United States entitled "An act establishing the Territory of New Mexico, approved September the 9th, 1850, and acts supplemental to and amend-
44 atory thereof," and under the act of the Legislative Assembly of said Territory of appointment of said Singleton M. Ashenfelter to the office of district attorney of the third judicial district of said Territory of New Mexico on the 28th day of October, 1885, and of removal from said office on said day of the said Edward C. Wade by the said Governor, was not conferred upon or possessed by said Governor under and by virtue of said acts of Congress, and that the said Edward C. Wade was, at the commencement of the said proceeding on November 10, 1885, and that said Singleton M. Ashenfelter was not, the lawful and rightful district attorney for the third judicial district of said Territory of New Mexico; wherefore this appellant appeals from the whole of the said final judgment and order, so made and entered in and by the supreme court of the Territory of New Mexico in said proceeding, and respectfully prays that the said judgment and order of the said supreme court of said Territory and the affidavit, information in the nature of a *quo warranto*, process, motion to quash, answer, pleadings, and proceedings

in the said cause or proceeding may be sent to the Supreme Court of the United States without delay, and that the said Supreme
45 Court will proceed to hear the said cause or proceeding anew, and that the said judgment and order of said supreme court of said Territory and every part thereof may be reversed and a judgment and order made dismissing the said information with costs, or such other order as to the said supreme court shall seem just.

H. L. WARREN,
*Att'y of Appellant.*

Supreme Court of the Territory of New Mexico.

I, R. M. Foree, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a correct copy (exclusive of the district court record) of the petition for appeal to, the Supreme Court of the United States of Singleton M. Ashenfelter in a cause in said supreme court of the Territory of New Mexico wherein the Territory of New Mexico upon the relation of Edward C. Wade is appellee and the said Singleton M. Ashenfelter is appellant, and the endorsement on the covering hereof is the true copy also of the endorsement on the covering of said petition; all of which appears from said petition on file in my office.

46 In witness whereof I have hereunto set my official hand and affixed the seal of the supreme court of the Territory of New Mexico this the twelfth (12th) day of July, A. D. 1887.

[Seal Supreme Court, Territory of New Mexico.]

R. M. FOREE, *Clerk.*

47 And afterwards, to wit, on the 5th day of March, 1887, bond was filed in the office of clerk of said supreme court as follows, to wit:

48 & 49 Know all men by these presents that we, Singleton M. Ashenfelter, of the town of Silver City, in the county of Grant and Territory of New Mexico, as principal, and Charles M. Shannon and Cornelius Bennett, both also of said town and county, as sureties, are held and firmly bound unto the Territory of New Mexico in the penal sum of four thousand dollars ($4,000.00); for the payment of which, well and truly to be made, we do jointly and severally bind ourselves, our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 25th day of February, 1887.

The condition of the above obligation is such that whereas, at the January, 1887, term of the supreme court of the Territory of New Mexico, in the matter of the Territory *ex rel.* Edward C. Wade *vs.* Singleton M. Ashenfelter, *quo warranto* pending in said supreme court upon appeal from the third judicial district court, Sierra county, in said Territory, judgment was rendered against said principal and appellant, Singleton M. Ashenfelter; and whereas in said cause the said Singleton M. Ashenfelter hath prayed and been granted an appeal from the judgment of the said supreme court to

the Supreme Court of the United States: Now, therefore, if he, the said Singleton M. Ashenfelter, shall well and truly prosecute
50 his said appeal with effect and without delay to final judgment and, if the judgment of the supreme court of the Territory of New Mexico be affirmed, shall pay all damages and costs occasioned by this appeal and which may be recovered before any court of competent jurisdiction, then and in that event this obligation to be null and void; otherwise to be in full force and of binding effect.

SINGLETON M. ASHENFELTER. [SEAL.]
CHARLES M. SHANNON. [SEAL.]
CORNELIUS BENNETT. [SEAL.]

TERRITORY OF NEW MEXICO, }
*County of Grant.* }

Before me, the undersigned authority, this day appeared the above-named Singleton M. Ashenfelter, Cornelius Bennett, and Charles M. Shannon, each of whom is personally well known to me, and they severally acknowledged that they executed the foregoing instrument of their own free will and accord and for the uses and purposes therein set forth, and the said Cornelius Bennett and Charles M. Shannon, being duly sworn, each for himself upon oath doth say he is worth the amount here set opposite his signature over and above his just debts and liabilities and property exempt by law from execution.

CORNELIUS BENNETT, $4,000.00.
CHARLES M. SHANNON, $4,000.00.

Witness my official hand and notarial seal, at Silver
51 City, New Mexico, this 25th day of February, 1887.

[Seal Edgar M. Young, Notary Public, Grant County, New Mexico.]

EDGAR M. YOUNG,
*Notary Public.*

The foregoing bond as to form and sufficiency of sureties is approved this 5th day of March, 1887.

ELISHA V. LONG,
*Chief Justice, &c.*

TERRITORY OF NEW MEXICO, }
*County of Santa Fe.* }

Supreme Court.

TERRITORY *ex rel.* WADE }
*vs.*
SINGLETON M. ASHENFELTER. }

I, R. M. Foree, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing two pages and 8 lines contain a true copy of the bond of Singleton M. Ashenfelter, together with the approval of same by Chief Justice Long, in the above-

entitled cause, and that the indorsement on the back hereof is a true copy of the indorsement on said bond as appears from the said bond now on file in my said office.

Given under my official hand and seal of said supreme court this 23rd day of June, 1887.

[Seal Supreme Court, Territory of New Mexico.]

R. M. FOREE, *Clerk.*

52 [Endorsed:] No. 256. Territory *ex rel.* Wade *vs.* S. M. Ashenfelter. Bond on appeal. Filed in my office this 5 day of March, 1887. R. M. Johnson, clerk.

53 Territory of New Mexico Supreme Court.

And afterwards, at the January term, 1887, of the said supreme court in and for said Territory, the following opinion was rendered and filed in matter of Territory of New Mexico *ex rel.* Wade *vs.* Singleton M. Ashenfelter:

In the Supreme Court, Territory of New Mexico. January Term, A. D. 1887.

| | |
|---|---|
| TERRITORY OF NEW MEXICO *ex rel.* EDWARD C. WADE *vs.* SINGLETON M. ASHENFELTER. | Appeal from the 3d District, County of Sierra. |

This is a proceeding brought by the Territory of New Mexico on the relation of Edward C. Wade against Singleton M. Ashenfelter, who is appellant. On the 10th day of November, A. D. 1885, the relator, Edward C. Wade, filed in the office of the clerk of the district court of the 3d judicial district, sitting in the county of Sierra, an affidavit, of which the following is a copy:

TERRITORY OF NEW MEXICO, *County of Sierra.*

Edward C. Wade, of lawful age, being duly sworn, upon his oath states that heretofore, to wit, in the month of March, A. D. 1884, he was by the Governor of the Territory of New Mexico, in due form of law, nominated for the office of district attorney for the 3d judicial district of said Territory; that such nomination was transmitted and submitted to the legislative council of said Territory and by said council confirmed, advised, and consented to, and that thereafter, on the 11th day of March, A. D. 1884, the said Governor, by and with the advice and consent of said legislative council, then in session at the capitol of said Territory, said advice and consent being given upon said nomination as aforesaid, appointed and commissioned him as such district attorney of said 3d judicial district in due form of law; that he thereupon and thereafter took the oath of office and entered upon his duties as such district attorney, and was legally possessed of and performed the duties of said office and exercised the powers and

received the emoluments thereof from the time of his said appointment to and induction into said office as aforesaid until the 9th day of November, A. D. 1885; that from and after his induction into said office as aforesaid he never resigned, abandoned, or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said office since his appointment thereto been abolished or its tenure in anywise changed or altered, nor has his term expired; that by virtue of his said appointment he was (as he is advised and believes) legally entitled to hold said office, perform the duties, and receive the emoluments thereof for the full term of two years and thereafter until his successor to said office should be lawfully appointed and qualified. He further states that on the 9th day of November, A. D. 1885, one Singleton M. Ashenfelter, illegally claiming said office under color of an unauthorized, illegal, and void appointment (as affiant is advised and believes), made long after the date of affiant's appointment by the Governor of the Territory of New Mexico, without the advice and consent of the legislative council of said Territory and at a time when said council was not in session, usurped, intruded into, and unlawfully (as affiant is advised and believes) held said office of district attorney for said 3d judicial district of the Territory of New Mexico and still does unlawfully (as affiant is advised and believes) hold said office, perform and execute the powers and duties thereof, and claim the emoluments of the same, and that since the said 9th day of November, A. D. 1885, the said Singleton M. Ashenfelter unlawfully (as affiant is advised and believes) excluded and still excludes this affiant from said office and has refused and still refuses to allow this affiant to hold and execute the said office or to receive the emoluments thereof. Affiant further says that he is desirous that the title of this affiant and of said Ashenfelter to said office and the right to exercise its functions and receive its emoluments should be judiciously inquired into and determined, and to that end a rule may be made, upon the facts herein stated, upon motion of the attorney general of the Territory of New Mexico for said Territory, upon the said Singleton M. Ashenfelter to show cause, if any he hath, why leave should not be given to file an information in the nature of a *quo warranto* in behalf of said Territory upon the relation of this affiant, the said Edward C. Wade, against the said Singleton M. Ashenfelter for usurping, intruding into, and unlawfully holding and exercising said office as aforesaid.

(Signed) EDWARD C. WADE.

Subscribed and sworn to before me this 10th day of November, A. D. 1885.

GEORGE R. BOWMAN, *Clerk.*

And thereupon William Breeden, attorney general, appeared in open court and moved for a rule upon Singleton M. Ashenfelter, predicated on said affidavit, to show cause, if any he had, why the said attorney general should not have leave to file an information

in the nature of a *quo warranto* in said court on behalf of the Territory of New Mexico on relation of said Wade and against said Ashenfelter for having illegally usurped and intruded into the office of district attorney for the 3d judicial district of said Territory. On the same day the court granted said rule requiring the respondent to so appear in said court on the 12th. On that day, Ashenfelter being in court in person and it having been shown that the rule to appear had been served upon him as ordered and no cause being shown, on motion of the attorney general, leave was given to file such information, and the same was then and there in open court on such leave filed. On the 13th day of November the attorney general appeared in open court and moved for an order directing process to issue upon said information, which process was on the 17th day of said month ordered by the court, and which thereupon issued in the following words:

"The Territory of New Mexico — Singleton M. Ashenfelter, Greeting:

"Whereas Wm. Breeden, attorney general for the Territory of New Mexico on the relation of Edward C. Wade, hath filed in the district court for the 3d judicial district of the Territory of New Mexico, sitting within and for the county of Sierra, by leave of the court, an information in the nature of a *quo warranto* alleging and charging that you, the said Singleton M. Ashenfelter, have unlawfully usurped, intruded into, and held the office of the district attorney for the 3d judicial district of the Territory of New Mexico and unlawfully exercised the powers and functions thereof, and that you, the said Singleton M. Ashenfelter, still unlawfully hold said office and exercise the powers and functions thereof without any authority of law and to the exclusion of said Edward C. Wade, who, it is alleged, is the legally appointed district attorney for said district and lawfully entitled to the possession of said office and to hold and enjoy and to exercise the powers and functions thereof: Therefore you, the said Singleton M. Ashenfelter, are hereby commanded that, laying all other matters and things aside, you do appear at 10 o'clock a. m. on Wednesday, November 18, 1885, before the said district court, now sitting in said county of Sierra, at the court-house of said county, then and there to answer unto said information concerning the matters therein alleged and charged against you and observe what the said court shall direct in this behalf.

"And this you do under penalty of the law and on pain of such judgment and other process as said court shall award.

"Witness the Hon. Wm. F. Henderson, associate justice of the supreme court of the Territory of New Mexico and judge of the 3d judicial district court thereof, and the seal of said court, this 17th day of November, A. D. 1885.

"[SEAL.] GEORGE R. BOWMAN, *Clerk.*"

On which said writ the sheriff of Sierra county, N. M., on the 17th day of November, 1885, made the following return and filed said writ, with said return, with the clerk:

I certify that I served the within writ upon the within-named Singleton M. Ashenfelter, at the county of Sierra, this the 17th day of November, A. D. 1885, at 10 o'clock a. m.

THOMAS MURPHY,
*Sheriff of Sierra County.*

This process was served on the day it issued, and the next day, the 18th, the following stipulation was filed in court:

THE TERRITORY OF NEW MEXICO, } ss:
*County of Sierra,* }

In the District Court for the 3d Judicial District. November Term, 1885.

THE TERRITORY OF NEW MEXICO on the Relation of EDWARD C. WADE
*vs.*
SINGLETON M. ASHENFELTER.

In order to expedite and obtain as speedy determination of this cause and to save the defendant all of the rights that he may have touching the jurisdiction of the court over his person herein, and that none of them may be waived, it is hereby agreed that the plea to jurisdiction and the answer may be filed and considered at the same time without the general appearance which may be entered for the purpose of such answer being considered as giving jurisdiction over the person of the defendant, but that the question as to whether the court acquired jurisdiction over the person of the defendant by reason of a process of summons issued by the court during the present term of this court and made returnable to the present term of this court may be considered the same as if no general answer had been made, but only special appearance for that purpose entered.

November 18, 1885.

WM. BREEDEN,
*Attorney General.*
G. G. POSEY,
IDUS L. FILDER,
W. T. THORNTON,
*Attorneys for Defendant.*

The respondent appeared specially in the district court and moved the court to quash the process and dismiss the information, and stated his reasons as follows:

First. Because the court has no jurisdiction over the subject-matter and no power to proceed by information, and can only proceed to try the right of office by the original writ of *quo warranto*, and not by an information in the nature of a *quo warranto*.

Second. The process issued in this cause is an original writ issuing out of this court, and could only be made returnable at the next succeeding term after the same was issued; whereas the writ issued

in this case was made returnable the same term at which it was issued.

Third. Because the court, as appears upon the face of the information and the writ, has no jurisdiction, either of the subject-matter in controversy or of the person of the defendant.

(Signed) SINGLETON M. ASHENFELTER.

The motion was overruled and the respondent excepted. Answer was then filed and the case submitted on the information and answer. At a later day of the same term the court adjudged and so entered of record that Ashenfelter is not entitled to the possession of the office of district attorney for the 3d judicial district, and that he unlawfully holds the same, but that Edward C. Wade is such district attorney and lawfully entitled to the possession of such office, and it is further adjudged that Ashenfelter surrender said office to the said Wade. From this judgment Ashenfelter appeals. The questions presented by the record for determination here therefore are—

First. Did the court below err in overruling the motion to quash and in taking jurisdiction over the person and subject-matter and in proceeding to hear and determine the case.

Second. Did the court err in its final judgment.

Upon the first-alleged error appellant contends—

First. That if any tribunal in this Territory has jurisdiction it is the supreme and not the district court.

Second. If any remedy exists to redress the wrong complained of, it is not on information, but by the original writ of *quo warranto*.

Third. That in any event the respondent should not have been required to appear at the term when the information was filed, but at a subsequent one.

As to the first question, sections 2006 and 2014, Compiled Laws, are cited. The first of these sections gives power to the supreme court to issue writs of prohibition, the other one confers authority on any judge of the supreme court to issue writs of *habeas corpus*. It does not therefore follow that exclusive jurisdiction is in the supreme court over such a proceeding as this one, especially in the light of section 666, Compiled Laws, as follows:

The district court shall have original jurisdiction in all cases, civil and criminal, in which jurisdiction is not especially delegated to some other court.

No statute has been cited which does "specially delegate" to the supreme court jurisdiction in this class of cases, and, in the absence of it, the foregoing section, by its express terms, settles the question of jurisdiction to be in the district court, but does not determine the character of the proceeding.

One provision of the organic act provides: "The district courts shall possess chancery, as well as common-law, jurisdiction." Section 1823 of the Compiled Laws, which section came in force in 1876, reads:

"In all courts in this Territory the common law, as recognized in

the United States of America, shall be the rule of practice and decision."

This court, in the case of Browning *vs.* The Estate of Browning, 9 West Coast Rep., 789, decided at last January term, considered these provisions and also made a review of the cases decided in the Territory referring thereto. It was there held, page 796:

"The Legislature intended by the language used in that section to adopt the common law or *lex non scripta* and such British statutes of a general nature not local to that kingdom nor in conflict with the Constitutions or laws of the United States nor of this Territory which are applicable to our condition and circumstances and which were in force at the time of our separation from the mother country." If section 1823, *supra*, and the section of the organic act above referred to are applicable to this proceeding our inquiry must be whether the common law at the time of that separation was such as to warrant the action of the court below. In Leitensdorfer *vs.* Webb, 1st N. M., 34, it is said: "By the 10th section of the organic law it is provided that the supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. Jurisdiction is properly the power to hear and determine causes. The common law, then, at least so far as to control and regulate the proceedings of the district court in the hearing and determining of causes, has been extended over this Territory by act of Congress, and that court, when it proceeds to hear and determine, must observe the course of proceedings prescribed by the common law." It may be this point was not exactly before the court in that case for determination, but the opinion is an elaborate and very able one, and the language quoted above was no doubt carefully considered and evidently the deliberate judgment of the court on the point stated.

In Arellano *vs.* Chacon, 1 N. M., 269, a case twice argued in the supreme court, and therefore presumably very carefully considered, the same section of the organic act herein quoted was before the court, and it was held:

"The district courts of this Territory may try issues of fact by juries, set aside verdicts for established legal causes, and grant new trials. To exert these high powers the law has expressly conferred the authority. It is a parcel of that common-law jurisdiction of which they are made depositories by the organic act."

When the observations made in the foregoing opinions are supplemented by the considerations stated in Browning *vs.* The Estate of Browning, *supra*, and the provisions of section 1823 of the Compiled Laws, it seems reasonably clear that the rule of common law as the same existed at the time of our separation from England, except so far as modified by statute, must determine the practice in the court below. If the territorial statute provides a rule of practice it must govern, but in its absence the course of proceeding at common law must be ascertained and followed. Recourse must therefore be had to the common law to ascertain whether the remedy is by the original writ of *quo warranto*, as claimed by appellant.

"*Quo warranto*, a writ which lies against any person or corporation that usurps any franchise of liberty against the king without good title, and is brought against the usurpers to show by what right and title they hold or claim such franchise or liberty. It is in the nature of a writ of right for the king against him who holds, claims, or usurps an office to inquire by what authority he supports his claim in order to determine the right. The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive even against the crown. This, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution by information filed in the court of king's bench by the attorney general in the nature of a writ of *quo warranto*, wherein the process is speedier and the judgment not quite so decisive." This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or to seize it from the crown, but hath long been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal. This proceeding is now applied by virtue of the statute 9th Ann, C. 20, which permits an information in the nature of a *quo warranto* to be brought with the leave of the court at the relation of any person desiring to prosecute the same against any person intruding into or unlawfully holding any franchise or office in any city, borough, or town corporate, — provides for its speedy determination."

5 Jacobs' Law Dictionary, page 373, where authorities are cited; Tomlin's Law Dic., vol. 5, 280; 3 Wendell's Blackstone, 262.

"The writ of *quo warranto* has long been superseded in practice by the proceeding by information in the nature of a *quo warranto*, which is the usual proceeding also in American practice." Bouvier, 373.

"There is one species of information still further regulated by the statute 9 Ann, C. 20, viz., those in the nature of a writ of *quo warranto*, which was shown in the preceding volume to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ." Wendell's Blackstone, 4 vol., 312.

"An information in the nature of a *quo warranto*, though a proper proceeding to try a right in respect to which in strictness in words it may not come, yet, being a remedial law, it shall receive as large a construction as the words will bear." 1 Salk., 376, S. C.

Upon a motion for leave to file an information in the nature of a *quo warranto* in State *vs.* Bunett, 2 Ala., 142, it is said: "The convenience of this mode of proceeding has rendered the old writ for ascertaining a right to an office or franchise entirely obsolete, and it may be questioned if such a writ would now be effectual."

In Donnelly *vs.* The People, 11, 111, 553, it is held "that proceeding (by information) is a substitute for the ancient writ of *quo warranto*."

"The precise period when this ancient writ fell into disuse in England and its place was usurped by the more modern remedy of an

information in the nature of a *quo warranto* cannot be definitely ascertained. It is certain, however, that the information, itself a common-law remedy, was of very early date, and it is probable that it began to supersede the more ancient remedy upon the abolition of the king's justices in Eyre and the substitution of the justices of assize."

High on Extraordinary Legal Remedies, 467.

It is established by the authorities cited, and their number could be increased, that the ancient original writ was long ago superseded, and cannot be the proper remedy in this case. This view
54 of that question disposes of the second point pressed upon the attention of this court.

The next matter in its proper order for consideration is whether the court erred in requiring process to issue returnable at the same term the information was filed.

Appellant, to support his contention that process should have issued returnable at the next term instead of at the same term, cites section 1903, Compiled Laws, as follows:

All original process in any suit shall be returned on the first day of the term next after its issuance. By this statute the first day of the term next after it issues is the return day of process authorized by the provisions of the section. The important inquiry is whether the section is applicable to extraordinary proceedings like the one here. Did the Legislative Assembly intend the section quoted to apply to remedies of an extraordinary kind, such as mandamus, prohibition, *quo warranto*, and the like, or was it the intention to apply it only to ordinary remedies as distinguished from extraordinary ones?

In Rapajalla's Law Dic., 1017, process is thus described: "A form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. The process of various courts of record consists of writs, summons, warrants, etc., and hence the terms 'process' and 'writs' are often used synonymously." In this manner the term original process is used in that section, and it is necessary to consider whether the process proper to issue when leave is granted to file an information to the nature of a writ of *quo warranto* was intended by section 1903. Sir William Blackstone, volume 3, page 131, in speaking of *habeas corpus* uses this language: "In the king's bench and common pleas it is necessary to apply for it (the writ of *habeas corpus*) by motion to the court as in cases of all other prerogative writs, *certiorari*, prohibition, mandamus, etc., which do not issue as of mere course without showing probable cause why the extraordinary power of the crown is called into the party's assistance." "Prerogative writs" are "remedies of an extraordinary kind granted by the courts in *certiorari* cases, but never as a matter of right, they being a direct intervention of the government with the liberty or property of the subject. The principal writs of this nature are (1) the writ of *procedendo*, (2) the writ of mandamus, (3) the writ of prohibition, (4) the writ of *quo warranto*, (5) the writ of *habeas corpus*, (6) the writ of *certiorari*." Rapajalla's Law Dic., vol. 2, 697.

"The prerogative writ of *quo warranto* has, however, fallen into disuse." *Ibid.*, 1057. These various writs are generally referred to as high prerogative writs, issuing as they do in a class of special remedies of extraordinary character. Originally the writ of mandamus was purely a prerogative writ. It was so called because it proceeded from the king himself, in his court of king's bench, superintending the police and preserving the peace of the realm." High, sec. 2. So it was with the original writ in *quo warranto*, prohibition, and in other extraordinary proceedings. As distinguished from what may, for the purpose of distinction, be designated as ordinary proceedings, those in usual use for the redress of grievances continually arising, they were regarded as extraordinary and were instituted, as Blackstone states, *supra*, "by motion to the court as in case of all prerogative writs," and were not granted as a matter of course, but on leave only. Was it the intention of the Legislative Assembly to apply section 1903, *supra*, to these extraordinary remedies, instituted before the passage of that section only on leave of the court, or to provide a uniform rule as to ordinary actions? This section was a part of the act of July 12, 1851. See page 190, Compiled Laws, 1865.

Resort to the context is proper in determining construction, and on examination of the act the purpose of this section will become more apparent. That act undertook to provide a code of practice in ordinary cases.

Section 20 of the act reads: "All civil suits shall be commenced and conducted by petition and answer, replication and rejoinder, rebutter and sur-rebutter, and in this order until the issue is formed."

Section 211: "When any person who may think he has a cause of action shall wish to bring suit against his adversary, he shall file in the office of the clerk a petition." The section then names what shall be set out in the petition.

Section 37 is identical with 1903 of the Compiled Laws, 1884, and reads: "All original process in any suit shall be returned on the first day of the term next after its issuance." It was in this connection that the section under consideration was made a part of the act of 1851. The system of practice thus instituted had its foundation in a petition as to the cause of action. This petition was intended to take the place of the common-law declaration and the bill of complaint in equity and to combine the two systems of pleading and practice into one in the nature of a code, as is manifest from section 6: "The names and distinctions between different actions as known to the common law of England and the United States shall not be deemed material by the courts of this Territory, and all matters of complaint or defense of a like nature may be joined respectively in the petition and answer. It was in suits of this kind brought by the petition provided for to which the section now numbered 1903 in the Compiled Laws of 1884 was to apply, and the return day of the process for which was fixed at the next term. It must be apparent this attempt to provide a new practice did not extend to the extraordinary remedies of *habeas corpus*, *quo warranto*,

mandamus, and the like, which were all well recognized as a separate and distinct class of proceedings, in which speed was the very essence of the remedy, but was only intended to apply to those ordinary suits in which the process issued as a matter of course. It was actions founded on petition and not those based on information to which the section applied. The one class was originally instituted only on leave of the court to obtain a prerogative writ, and the practice as to the class is thus defined "prerogative writs;" in practice a writ issued upon some extraordinary occasion and for which it is necessary to apply by motion to the court; a writ not issuing as of course without showing some probable cause why it should be granted. The writ of *habeas corpus, procedendo*, mandamus, prohibition, *quo warranto*, belong to this class." 2nd vol. Burrill, 423; 3 Blackstone Com., 132; 3 Steph. Com., 681.

To hold that this statute determines the character and return day of the process in these special proceedings would be to utterly ignore the well-known distinctions at common law between cases originating under the high prerogative writs, by leave on motion, usually designated extraordinary remedies, and that other equally well-defined large class of cases where process is not a question of leave, but is issued as a matter of right, and introduce confusion and delay in place of certainty and speed.

Can it be reasonably contended the Assembly meant to provide by the act of 1851 that one believing himself aggrieved could file with the clerk his petition not verified, and thereupon, without leave, as a matter of course, a writ of *habeas corpus*, mandamus, or *quo warranto* should issue returnable at the next term? The statement of the inquiry carries its own answer.

The following case is in point: "*Quo warranto* is the legal writ to try the right to hold office and for ousting an usurper. This court sits but once a year. The writ does not issue except upon motion and after rule and cause shown, and if when issued it must go to the common rules for pleading the remedy will prove wholly ineffectual, for the office usurped would expire before the complaint would be got ready for trial, and the judgment of ouster, if rendered, would operate on a person no longer in the possession of the office. We must so exercise jurisdiction as to give effect to the administration of the law and not take a course certain to render it nugatory. The defendant will be ruled to plead to-morrow morning."

State *vs.* Buchanan, 1 Wright, Ohio, 239.

In Vermont the statute provided "power is given to the supreme court to issue and determine all writs of error, *certiorari*, mandamus, prohibition, and *quo warranto*," but the mode of procedure was not prescribed.

The supreme court in State *ex rel.* Page *vs.* Smith *et al.*, 48 Vermont, 231, adopted the practice in England. Judge Redfield, a very able jurist and law writer, in that case makes the ruling in the following terms: "It is not denied that at the time our statute was enacted and down to the present time the practice was settled and uniform in the courts of England that after leave was granted and

the information filed the respondents had time and opportunity to plead to the information. The nature of the application is summary and requires speed, and the court will see to it that there is no delay. The statute gives merely jurisdiction to this court of these prerogative writs. We think when an information is allowed to be filed it is the duty of the court to fix some time, ordinarily during the same term, for the respondent to appear and plead."

Lindsey *vs.* The Attorney General, 4 Miss., 523, is a very instructive case. The practice adopted by the trial court in the case now here evidently followed that one. The practice in the two cases is identical. If the rule followed in that case is correct there is no error in the mode of proceeding adopted in the 3d district in this one. It is observed in the Mississippi case: "The very nature of the right asserted requires a speedy remedy. It is not only the right of the party—of the party having the legal title to the office—to be placed at once in possession and enjoyment of it, but it is also the policy of the law that he alone who has been intrusted with the public confidence, in the mode pointed out by law, should perform the duties of the office. The remedy to be valuable should be speedy. It was so under the practice as regulated by the rules of the common law, * * * and we find nothing in the policy of the law or the theory of our government requiring us to make the remedy less efficient than it is under the English practice."

The same reason applies with even greater weight in this Territory.

The statute of Anne, to which reference is made, became a law in A. D. 1710, and so far as applicable to this cause is as follows (see High, 647, Statute of Anne, 9 Ann., ch. 20): An act for rendering the proceedings upon writs of mandamus and informations in the nature of a *quo warranto* more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs.

I. Whereas divers persons have of late illegally intruded themselves into and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales, and where such offices were annual offices it hath been found very difficult, if not impracticable, by the laws now in being to bring to a trial and determination the right of such persons to the said offices within the compass of the year, and where such offices were not annual offices it hath been found difficult to try and determine the right of such persons to such offices before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs, and places wherein they have respectively acted; and whereas divers persons who had a right to such offices or to be burgesses or freemen of such cities, towns corporate, boroughs, or places have either been illegally turned out of the same or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or fran-

chises of being burgesses or freemen than by writs of mandamus, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued and more are likely to ensue, if not timely prevented, for remedy whereof be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of Trinity term, in the year of our Lord one thousand seven hundred and eleven, where any writ of mandamus shall issue out of the court of queen's bench, the courts of sessions of counties palatine, or out of any of the courts of grand sessions in Wales, in any of the cases aforesaid, such person or persons who by the laws of this realm are required to make a return to such writ of mandamus shall make his or their return to the first writ of mandamus.

IV. And be it further enacted by the authority aforesaid, That from and after the said first day of the Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto;* and if it shall appear to the said respective courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto* shall proceed thereupon with the most convenient speed that may be, any law or usage to the contrary thereof in anywise notwithstanding.

V. And be it further enacted and declared by the authority aforesaid that from and after the said first day of Trinity term, in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said courts shall be found or adjudged guilty of an usurpation or intrusion into or unlawfully holding and executing any of the said offices or franchises, it shall and may be

lawful to and for the said courts, respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises as to fine such person or persons, respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts, respectively, to give judgment that the relator or relators in such information named shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information he or they for whom such judgment shall be given shall recover his or their costs therein expended against such relator or relators, such cost to be levied in manner aforesaid.

VI. And be it further enacted and declared by the authority aforesaid that it shall and may be lawful to and for the said courts, respectively, to allow to such person or persons, respectively, to whom any writ of mandamus shall be directed or against whom any information in the nature of a *quo warranto* in any of the cases aforesaid shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time, respectively, to make a return, plead, reply, rejoin, or demur as to the said courts, respectively, shall seem just and reasonable, anything herein contained to the contrary thereof in anywise notwithstanding.

It is apparent from the tenor of the act that it was intended to furnish speedy relief against the wrongs mentioned in it, while the act, in terms, was limited to the "rights of offices and franchises in corporations and boroughs," yet its terms were extended in practice to include other rights and offices, so that it gradually became the means for determining the title to office.

Here was an act in full force furnishing a most speedy and convenient mode for ousting one who wrongfully intruded himself into office. In this country, where most offices are elective and where terms are not long and questions of title often accruing, we are asked to hold that the Legislative Assembly of the Territory intended to adopt a system less effective than the English one and which would create delay and enable the holder to occupy for the full term before the final judgment of the law could oust him. If the possessor must be summoned to appear at an ensuing term and the delay occurs incident to ordinary proceedings, it is too plain for doubt that the remedy is wholly without efficacy. We are not willing to believe, under our institutions, that any such legislative intent was present when section 1903, *supra*, was passed, but, on the contrary, are inclined to adopt that construction most in harmony with our institutions and best calculated to insure a speedy determination of title to office, a question under our political system of vital importance. By holding that that section was intended to apply only to ordinary proceedings, where process issues as a matter of course, and not to those special proceedings where speed is the essence of the remedy, a distinction in the mode of proceeding which formerly prevailed and which now almost everywhere obtains is preserved, and a system of procedure recognized which will best subserve the ends of justice and accord with what we believe to have

been the legislative intent. The conclusion is that it was correct practice in the court below to cause process to be issued and served returnable during the term, and in doing so the court committed no error and therefore properly overruled the motion to quash the process.

Having thus disposed of the question of practice interposed, the inquiry next arising for determination is as to the final judgment of the court on the merits. The following are the facts established by the record upon which the judgment of the court below was predicated March 11, A. D. 1884: Edward C. Wade, the relator, was duly and legally appointed by the Governor of the Territory of New Mexico, by and with the advice and consent of the legislative council thereof, to the office of district attorney for the 3d judicial district. Said Wade took the oath of office as such district attorney, as required by law, and entered upon the duties thereof, and was lawfully possessed of the same. He performed its duties and received its emoluments continuously, openly, and notoriously until the 9th day of November, A. D. 1885. He never resigned said office, abandoned the same, nor was he removed therefrom. On said last-named day, over the objection, protest, and opposition of said Wade, the appellant, Singleton Ashenfelter, took possession thereof, claiming to be lawfully entitled thereto. The appellant predicates his right to the office in question on the following facts: On the 28th day of October, A. D. 1885, Hon. Edmund G. Ross was Governor of said Territory and as such made, executed, and delivered to said Ashenfelter a commission whereby, so far as he legally could, he appointed the said Ashenfelter to the said office. The said appointee accepted said commission and duly and in legal form took the oath of office, and on the said 9th day of November, as before stated, took possession and began to discharge the duties of the same. From the date of the said commission so held by Ashenfelter to the time of bringing this proceeding the legislative council had not at any time been in session and never advised or consented to said appointment in any form whatsoever or took any action repealing the same. The question under these facts is, Which party was entitled to hold the said office at the institution of this case. As bearing upon the point it is important to inquire if at the date of Ashenfelter's commission there was any vacancy in the office to which he was appointed. If there was such vacancy, then it becomes necessary to determine whether the Governor had the legal power alone, in the recess of the Legislature, to fill it. If there was no such vacancy otherwise occurring, then the question arises, Did the Governor have the power to create a vacancy by the mere act of appointment and delivery of the commission to Ashenfelter, and by the same act both create and fill the vacancy?

55

There is no pretense that there was any effort to remove the relator, unless the appointment of Ashenfelter and his commission so operated. It is important to determine whether the office of district attorney for the 3d district is one with a certain tenure. To settle that inquiry the legislation of the Territory must be examined, for upon its construction must rest the determination of the question

whether or not the office of district attorney for the 3d district has a fixed tenure. There can be no intelligent comprehension of the question without a consideration of the several acts of the Assembly relating to the subject, and therefore said enactments are here set out as follows:

First. An act to create the office of attorney general:

SECTION 7. That the Governor, by and with the consent of the legislative council, shall appoint an attorney general for said Territory, who shall reside and keep his office at the seat of Government, and he shall hold his office for two years and until his successor shall be appointed and qualified.

SECTION 8. When required, he shall give his opinion in writing to the Governor, auditor, and treasurer upon any question of law relating to their respective duties and offices.

SECTION 9. The attorney general shall commence and prosecute all criminal and civil actions, in the district courts of the several counties of this Territory, in which the Territory or any county may be concerned, and in like manner he shall defend all suits which may be brought against the Territory or any county of the same; he shall prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the Territory or to any county thereof.

SECTION 10. If the attorney general shall be interested or shall have been concerned in any cause or shall be absent at the trial of any cause in which the Territory or any county is concerned the district judge may appoint some other person to prosecute or defend the cause, and the person thus appointed shall have the same power and receive the same fees as the attorney general would if he was present.

SECTION 11. In addition to the fees of office, the attorney general shall receive a salary of $1,500 per annum: Provided, That in no case shall there be taxed any fees against the Territory for prosecuting or defending.

SECTION 15. This act shall take effect and be in force from and after its passage. Approved February 2nd, 1859.

Second. An act to amend the law relative to the attorney general and to authorize the Governor to appoint a district attorney for the 3d district of this Territory:

SECTION. 16. That the law authorizing the appointment of an attorney general for this Territory be, and the same is, so amended as to require the attorney general to perform the duties therein designated in the supreme court and district courts of the 1st and 2d judicial districts only.

SECTION 17. The salary of the attorney general shall be reduced to $600, instead of $1,500 as now provided by law.

SECTION 18. That all the duties required of the attorney general by law now in force shall remain in full force as it concerns him.

SECTION 19. That the Governor, by and with the advice of the legislative council, shall appoint some person learned in law as attorney general for the 3d judicial district of this Territory, who shall reside and keep his office in the said 3d district, and shall continue

in office for the term of two years and until his successor shall be appointed and qualified.

SECTION 20. The district attorney for the 3d district shall be required to perform the same duties in the several counties of his district as designated as the duties of the attorney general, and shall receive the same fees for his services and no more.

SECTION 21. The said district attorney shall receive a salary of $400 annually, to be paid out of the territorial treasury, in addition to his fees of office: Provided, That in no case shall any fees be charged against the Territory.

SECTION 22. That all laws applicable to the attorney general shall be applicable to the said district attorney for the said 3d district.

SECTION 23. Be it further enacted, That if from any cause the attorney general shall fail to attend any term of the district court, in such case the presiding judge of said court is authorized to appoint some person of his confidence to represent the attorney general during the term of the district court, and the person so appointed by said judge shall receive $5 per day for his services for all the time the said court may continue in session, and, further, shall be entitled to all the fees allowed by law to the attorney general, and the sum paid to the person thus appointed shall be deducted from the salary allowed to the attorney general; and the auditor of public accounts in such case is required to draw on the territorial treasury for the pay of the person so appointed by said judge on his services being certified by a certificate of the said judge.

SECTION 24. That this act shall take effect from and after its passage. Approved February 28, 1862.

Third. An act designating the districts of the attorney general and district attorneys:

SECTION 25. That hereafter it shall be the duty of the attorney general to attend and prosecute in the supreme court of the Territory and in the district courts of the counties of Santa Fé, San Miguel, Mora, Taos, and Rio Arriba, and he shall receive the salary and fees as at present prescribed by law.

SECTION 26. There shall be a district attorney appointed by the Governor, by and with the advice and consent of the legislative council, for the counties of Santa Ana, Bernalillo, Valencia, and Socorro, and another appointed in the same manner for the counties which may now or hereafter be created in this Territory south of the Jornada del Muerto, who shall perform the duties and receive the fees and salaries now established by law.

SECTION 27. That this act shall take effect from and after its passage. Approved January 23, 1863.

Fourth. Assignment of judges.

An act in relation to the judicial districts:

SECTION 1. That from and after the passage of this act the Territory of New Mexico shall be divided into three judicial districts as follows, to wit:

The counties of Santa Fé, San Miguel, Mora, Taos, Rio Arriba shall constitute the 1st judicial district, and the counties of Santa Ana, Bernalillo, Valencia, and Socorro shall constitute the 2d judi-

cial district, and all that part of the Territory embraced in the county of Dona Ana shall constitute the 3d judicial district: Provided, That the times and places of holding the courts remain in force as now provided by law.

SECTION 2. That the Hon. Kirby Benedict, chief justice, be, and is hereby, assigned, as now provided by law, to the 1st judicial district; that the Hon. Sidney A. Hubble, associate justice, be, and he is hereby, assigned to the 2d judicial district, and the Hon. Joseph G. Knapp, associate justice, be, and is hereby, assigned to the 3d judicial district.

The act first herein set out is, as shown by the title, "An act to create the office of attorney general." It also determines the tenure thereof and the salary connected with the same. This was in February, A. D. 1859. Three years later, February 28, 1862, the second act set out above was approved. Its construction is the one about which there is most contention. It is the only act found in which the term of office for district attorney for the 3d district is claimed to be fixed, and this contention cannot prevail unless the words "attorney general" used in the 19th section of the act was intended in the "district attorney." In the act of 1859 the duties of the attorney general were co-extensive with the Territory, but by the act of 1862 his duties were expressly limited "to the supreme court and the district courts of the 1st and 2d districts," and his salary was reduced to $600. In the act of January 28, 1862, section 25, as above set out, the territorial limits within which the attorney general was to exercise his duties was again reduced and restricted to what now constitutes the 1st judicial district. These acts also establish a legislative intent not only to restrict the limits within which the attorney general should discharge the duties of a prosecuting officer in the actual trial of causes, but also an intent to create prosecuting officers within the several districts. By section 19 of the act of 1862 a prosecuting officer was provided for in the territory in which by the former act the attorney general had been prosecutor, while assigning the attorney general to like duties in the other district. In the act of January, 1863, the attorney general is assigned to duty as a prosecutor, a district attorney is provided for Santa Ana, Bernalillo, Valencia, and Socorro, and a district attorney for the county south of the Jornada del Muerto. While this last region is not named as the 3d district, it was so in fact. In this act no tenure is fixed. It provides an additional district attorney. The intent to provide a separate prosecuting officer within each district by some designation is thus clearly apparent. Was it the purpose by the act of 1862 to provide for two attorneys general, one for the 1st and 2d districts and one for the 3d district, or was it the purpose of the act to provide a district attorney for the 3d district and assign the attorney general to the other two? It is a well-settled rule of construction that resort may be had not only to the words of a statute, but as well to its title and context. "If a doubt arise as to the proper construction to be given to a particular clause of a statute, resort may be had to the entire section or statute

upon the subject of which the clause in question forms a point.' Sedgwick, 237, Williams *vs.* Thomas, decided last term.

The title of this law and the context are radiant with light to aid construction.

It is designated by the Legislature "An act to authorize the Governor to appoint a district attorney for the 3d district." It is not an act to provide for an additional attorney general for such district, but by name for a district attorney. In the very beginning it purports to legislate respecting two officers by different names, performing duties of the same general character, but within different territorial limits. It is true the words "attorney general" are used in the 19th section. Is such use a clerical inaccuracy? There can be no doubt it was intended by the act to provide a prosecuting officer for the 3d district. If the purpose was to designate him attorney general it is difficult to understand why in sections 20 and 21, immediately following section 19, such officer should be designated as a district attorney; in section 20 the prosecuting officer is designated "the district attorney for the 3d district;" in section 21, "the said district attorney;" in section 22, "the said district attorney." The word "said" in these two sections in ascertaining the legislative intent is full of significance. To what do they refer? What is meant when it is stated in section 20 "the district attorney for the 3d district shall be required to perform" certain duties therein named? The term "said district attorney" either refers back to the officer mentioned in the 19th section as attorney general or it is absolutely meaningless. If such term does not refer back to that section to what is reference made? No satisfactory answer can be made to this inquiry.

Unless section nineteen provides for a "district attorney," then at the time of the passage of the act there was no such officer, and the references in the sections 20, 21, and 22 are to officers having no existence, for whom no provision had been made. Such an interpretation would declare the Assembly and the Legislature of 1862 guilty of the absurdity of providing duties, fixing a term and salary for an office not in existence, nor called by that body into being. If, however, it is held that the words "attorney general" were inserted in the act by clerical mistake, when the words "district attorney" were intended, and the section read in that way, then the whole act is consistent with its title, each section with every other, and the act becomes at once intelligible and effective. The preamble and the said several sections are here placed in juxtaposition that their true interpretation and meaning may be the more apparent.

An act to amend the law relative to the attorney general and to authorize the Governor to appoint a district attorney for the 3d district of this Territory:

SECTION 19. That the Governor, by and with the advice of the legislative counsel, shall appoint some person learned in law as attorney general for the 3d judicial district of this Territory, who shall reside and keep his office in the said district, and shall continue in office for the term of two years and until his successor shall be appointed and qualified.

SECTION 20. The district attorney for the 3d district shall be required to perform the same duties in the several counties of his district as designated as the duties of the attorney general, and shall receive the same fees for his services and no more.

SECTION 21. The said district attorney shall receive a salary of $400 annually, to be paid out of the territorial treasury, in addition to his fees of office: Provided, That in no case shall any fees be charged against the Territory.

SECTION 22. That all laws applicable to the attorney general shall be applicable to the said district attorney for the said 3d district.

Read literally, the whole act, so far as it undertakes to provide a prosecuting officer for the 3d district, is wholly nugatory, as no duties are prescribed for an attorney general for the 3d district, nor fees nor salary. Read according to its spirit and evident intent, it is a harmonious and effective act, creating, as the title says it intends to do, a district attorney, fixing his fees and salary, prescribing duties and tenures. That section nineteen should be read according to its evident intent and not literally is very clear.

Where two constructions may reasonably be adopted, one of which will render an act wholly nugatory and the other will make it effectual, the latter should be adopted.

The act of 1863 amounts to a legislative construction of the former act. It provides for the appointment of a district attorney in the territory south of the Joranda del Muerto, who shall receive the fees and salary now established by law. Unless the act of 1862 prescribed duties and provided fees for such an officer, none existed. The act of 1862 assumes that such an office was in existence, as the title clearly implies. It is plain that section 19 of the act of 1862 should be construed to create and fix the tenure of office of the district attorney for the 3d district, and that under said act the Governor, by the advice and with the consent of the legislative counsel, appoints such officer, who holds his place for two years and until his successor is appointed and qualified.

He holds, then, by a fixed tenure. This is the law applicable to the office in controversy. It is not contended that Mr. Wade's time had expired when Mr. Ashenfelter received his commission. So the conclusions reached compel a consideration of the last inquiry, as to the power of the executive, at his own will, to remove this officer, holding a term fixed by law, and that question will now be considered.

Under our governmental system all power is inherent in the people, and the executive has the express and incidental powers conferred by law and no more. For the right asserted by appellant he must affirmatively show legal authority.

Even in England, where Parliament is supreme and where acts of Parliament can seldom be questioned, the power of the crown is always open to question, and no one can give or be deprived of rights by prerogative interference, except in strict accordance with the law of the land. No executive authority exists outside of its legal boundaries. 12 Co. Rep., 76; 1 Inst., 36, 63, 406.

Various statutes of this Territory are cited by appellant to estab-

lish that the executive was clothed with the power of removal at the date when Ashenfelter received his commission. These will now be considered.

It is claimed by the appellant that section 1740, Compiled Laws, gave to the executive power to make an appointment to the office of district attorney during the recess of the Legislative Assembly. That section is in the following terms:

"In all cases wherein the Governor is or may be authorized by law to make appointments, by and with the advice and consent of the council, he is hereby authorized to make temporary appointments during the recess of the Assembly, to continue until the meeting of the same."

It is contended that as the Governor is empowered during a session of the Legislative Assembly to appoint a district attorney, by and with the advice and consent of the council, that in the recess, by virtue of the foregoing section, he may alone appoint until the meeting of the council. Such a contention assumes that if the Legislative Assembly had been in session at the date of Ashenfelter's commission the Governor would in that event have been clothed with power, acting with the council, to appoint him. While the executive might so appoint during a session of the Assembly to fill a vacancy, it does not necessarily follow that he could do so where no vacancy existed. The whole question resolves itself into the power of the Governor to remove. If he did not have the power to remove no vacancy occurred, as Wade held by a fixed tenure, which had not expired at the date of the attempted removal. The foregoing section means only that where a vacancy occurs during the recess the Governor may appoint in the interim, and not that during such recess he may fill an office already full with an existing incumbent. Unless the executive had the power to create a vacancy by removal there was no vacancy to fill during the recess, so the section cannot aid the appellant until it be first determined that there was at the time of his appointment a vacancy, and that depends on the extent of the executive power.

Section 1841, R. S. U. S., 1875, p. 1373, is also referred to as
56 giving authority to the executive to make this appointment. So much of this section as is pertinent to this discussion reads as follows: "The executive power of each Territory shall be vested in a Governor, who * * * shall take care that the laws are faithfully executed." A similar provision was under consideration in Field *vs.* The People, 3 Ill., 91. As the case will be referred to upon another point, it is worthy of observation that the supreme court of Illinois, at the time that case was decided, included among its members such able judges as Breese, Seates, and Treat, of national fame for learning and ability. It is there said of a like provision: "This clause is merely declaratory and directory. It confesses no specific powers, nor does it enjoin any specific duty." This power of general supervision, says an able commentator on American law (2 Walker's Am. Law, 103), "is a duty enjoined on the Federal and State executives. It would be dangerous, however, to treat this clause as conferring any specific power which they would not other-

wise possess. It is to be regarded as a comprehensive description of the duty of the executive to watch with vigilance over all the public interests. The Governor is not to execute the laws himself, but see them executed. This duty is performed by lending the aid and power of the executive arm to overcome resistance to law. The history of the Federal and State governments afford practical exposition of this clause of the Constitution, in conformity with its construction. The executive is to see the laws executed as they may be expounded by those to whom that duty is entrusted. If this clause confers the power of supervision and dismissal as to one officer, it also gives the same authority over every other one in the Government upon whom the performance of a duty may be enjoined. The injunction to see the laws executed is general and sufficiently comprehensive to embrace every law and officer. If under this clause the Governor may dismiss the secretary, it cannot be seen why he may not dismiss every other one without regard to their manner of appointment or the tenure of office; and thus by the construction of one clause bring all the officers and the operation of all the laws of the State under executive control. This would counteract the whole scope and design of the Constitution by substituting the changing and capricious will of one man for the fixed and known rules of the law. From this consequence there is no escape if the rule be as contended for one." This quotation from a learned court constitutes such an able statement of reasons why the construction contended for by appellant as to the power contained in section 1841 should not prevail that it leaves but little more to be said.

The section is in its very terms declaratory, and it must be apparent that it was not intended by this act to give to the executive the power to remove at will. The several departments of Government, the executive, legislative, and judicial, under our system are separate and distinct in the performance of different functions, closely related to each other, yet independent. To construe this section so as by reason of its terms alone to give power to the executive to remove at will would enable such department, by exercise of the mere power of removal, to override and control the judicial. If the personal or official action of a prosecuting officer should be displeasing, the executive could arbitrarily remove at will, and thereby, by virtue of the power of removal, could control the whole judicial machinery so far as it relates to the criminal law, and the executive, as an incident to this power, would be able to control the course of proceedings in a co-ordinate and distinct department of the Government and to make the judicial prosecuting officers wholly subservient to executive direction. Such a result under a system where independent action in the several departments of the Government is everywhere recognized was surely not intended in the section invoked by appellant. It is not believed any such power is conferred by that section.

A very able argument is made by appellant's counsel drawn from the power of removal exercised by the President, and therefrom it is sought to be deduced by analogy that a similar authority exists in State and territorial executives. To extend the argument thus

made to its legitimate end, if it is one proper to be adopted, the right of removal would thereby be carried to every executive of the several States, except when express limitation prevailed, in as full and ample a manner as that authority heretofore existed in the chief executive of the United States. If such a view were correct the exercise of that right by State executives would have been so frequent that the record of adjudication, now very numerous, would be a mine of information and authority establishing such a continuous exercise of the power by judicial sanction that the right of State executives would be as clearly ascertainable as that conceded in the President. No precedent has been referred to in the presentation of this case where the power of removal by a State executive against one holding office by a certain tenure has been sanctioned by the courts of last resort. This is of itself strong and persuasive against the right, and greatly weakens the argument upon the analogy sought to be maintained between the powers of the General and territorial governments. The reasoning of the court in Field *vs.* The People, *supra*, is here quoted as a sufficient answer to the contention on that point:

"The marked disparity between the powers and responsibility of the General Government and that of this State naturally and necessarily results from the different character of the respective governments, their powers, duties, and the object of their creation."

The Government of the United States is the National Government of the Union. To that is delegated the attributes of national sovereignty. The duties of the executive of the National Government are therefore widely extended and greatly diversified, embracing all the ordinary and extraordinary arrangements of peace and war, of diplomacy and navigation, of finance, of naval and military operations, and of the execution of the laws throughout almost infinite ramifications of details and in places at vast distances from each other. His views are not bounded even by the circuit of the whole Union, but must extend to the most remote regions to which commerce or navigation has extended or connected our interest. So multifarious and diversified, therefore, are the functions of his office that the limited abilities of no one man are equal to their discharge. Hence the necessity of organizing various departments and the employment of numerous ambassadors and other public ministers, all of whom constitute so many aids and helps in the performance of the executive duties of the President; and as many of the duties of these officers cannot be regulated by law, because they cannot be anticipated, but arise out of the changing exigencies of time and circumstances, large discretion must, from necessity, be vested somewhere; and it has been vested in the President as the chief executive officer of the Government. From his interest in and control over all the business of the executive department and his political responsibility for its administration arises his right to supervise, control, and dismiss those executive officers who are his political and confidential aids in the discharge of his executive duties.

But the State governments are widely different in their objects, powers, and duties. Compared with the General Government they

may be denominated domestic governments. They act exclusively upon the domestic relations of life. Their regulations and sphere of action are limited to their territorial boundaries. The powers and duties of the chief executive magistrate, therefore, are proportionably limited, and such as from their nature are capable of being specifically prescribed and regulated by law, and, unlike those of the President, they may all be performed in person. He neither has nor does he require the aid of others in the performance of any of his duties. The duties, likewise, of all the executive officers of the State are capable of being regulated by law, and by our Constitution they are required to be so regulated. No discretionary authority or control over them is delegated to the Governor by the Constitution, nor does it contemplate the delegation of such power by law.

From the discretionary powers with which the President is clothed there is a necessity for his possessing the power of removal which does not exist in the case of the Governor. The heads of the Departments and public ministers being the political and confidential officers of the President to execute his will and act in cases in which he possesses a legal discretion, all their acts in this character are only politically examinable. The duties which are not enjoined by law cannot be enforced by its process; but as the law has expressly given to the President the right to prescribe the duties of those officers, it also gives, by necessary implication, the power of removal as a means of rendering available the authority expressly granted.

We are thus brought to the last point of the appellant's contention, to wit, "that the power to remove is a necessary legal adjunct and incident of the power of appointment."

Fortunately authority entitled to much consideration exists, making the question reasonably clear.

The subject is discussed in two classes of cases—in one class where the office is held without any fixed term, in the other where the law has attached to it a time during which the occupant may hold. In the first class, where the office is held only at the will of the appointing power, the right to remove does exist as an incident of the power to appoint.

*Ex parte* Hennen, 13 Peters, 256.
Keenen *vs.* Petery, 24 Texas, 253.

In the other class of cases, however, the ruling is different. In the case of People *vs.* Bissell, 49 Cal., 412, it is said:

"The word tenure, as used in this section, is, in my opinion, to be construed as meaning term, the effect of which is to continue the incumbent in office for the period of four years from the time of his appointment. Under that construction, his term not having expired, the Governor has no power to appoint.

The case for determination by this court comes within the second class, those where the tenure is fixed by law, as it is hereinbefore held upon a construction of the territorial statutes that Wade held his office for a fixed period, which had not expired when the relator received his commission. In the statute of Texas there is this

provision: "The Governor shall appoint one county treasurer, who shall hold his office until the next general election in this State or until otherwise provided by law." The supreme court of that State made its ruling under such a statute, from which we quote:

"The county treasurer, when once appointed in the mode prescribed by law, has a vested right to his office and cannot be removed except for cause amounting to a forfeiture of his office. The principle that the power of removal is incident to the power of appointment is applicable only in those cases where the office is held at the pleasure of the appointing power and the tenure is not fixed by law." Colins *vs.* Tracy, 36 Texas, 547. There being no law of this State specially authorizing the Governor to remove a county treasurer from office, it follows that he can only be removed on conviction by a jury, after indictment, for malfeasance, non-feasance, or misfeasance in office.

In the People *vs.* Jewett, 6 Cal., 292, Chief Justice Terry states the point decided this way: "The case under consideration presents the single question whether the Governor of this State can remove from office a notary appointed under the provisions of this act before his full term has expired. It was held by the court, the office being for a fixed term, the Governor could not during the continuance of the term remove the incumbent.

"All offices must be created and held in accordance with law.

"An office is as much a species of property as anything which is capable of being held or owned." Narmack *vs.* Hallmay, 2 Ala., 33.

In the Texas case, *supra*, it is said "the holder of an office has a vested right therein;" in the Alabama case, that the right to hold such office where the term is fixed is a species of property, so an arbitrary removal without notice or opportunity to be heard or deny charges would be taking away property without process of law.

The supreme court of Michigan, in Dullam *vs.* Wilson, 53 Mich., 392, S. C., 51 American Rep., 128, delivered an elaborate and exhaustive opinion reviewing the authorities on this subject, with Judge Cooley as a member of the bench. In that case Wilson, the respondent, was in possession of the office of trustee of the Michigan Institution for the Advancement of the Deaf, Dumb, and Blind. His term expired by law February, A. D. 1887. He held his appointment from the executive. On the 2d of July, 1883, Governor Begole, without preferring charges against Wilson or giving him opportunity to answer, deny, or explain charges of official misconduct, attempted to remove him by an executive order which read as follows:

EXECUTIVE OFFICE,
LANSING, *July 2d*, 1883.

To James C. Wilson, Esq.

DEAR SIR: I have this day, for your official misconduct and habitual neglect of duty, removed you from the office of trustee of

the Michigan Institution for the Deaf and Dumb. The reasons for such removal I shall lay before the Legislature at its next session.

Yours respectfully, JOSIAH W. BEGOLE.

On the same day the Governor appointed in due form of law the relator Dullam to the place, and Wilson, refusing to retire, was brought into the court by proceeding in *quo warranto*. The Governor of Michigan was supported by an authority which does not exist in this Territory, making that case a much stronger one in favor of the power of removal than the present one. A constitutional provision there in force read as follows: "The Governor shall have power, and it shall be his duty, except at such time as the Legislature may be in session, to * * * remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance, either of the following State officers." Among them was the trustee named in the Governor's order.

Under such circumstances, upon a very careful consideration, the learned court held that the Governor must first notify the officer of the intention to remove with statement of the *of the* causes, and give him an opportunity to be heard, and also denied the executive right to make the change by the mere act of removing the incumbent and appointing his successor.

In the opinion delivered by Judge Champlin in the case he makes the following very clear and forcible observations:

"I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. If it exists, it places in the power of the Governor at his mere will or caprice to remove all the State officers except legislative and judicial, and to fill their places with his own partisans, thus revolutionizing the whole administration of the State and defeating the express will of the people. It is no argument to say it may never be done. It is sufficient to know that it could be done."

These reasons apply with greater weight when the officer sought to be removed is one in no way connected with executive duties, but is in a separate department performing duties as an officer of the court.

In the State of Kentucky the statute required the secretary to reside and perform his duties at the seat of government. Ben. Hardin, secretary, declined to do so and the Governor attempted to remove him and made an executive order to that end in these words:

SEPT. 1, 1846.

"Whereas Benjamin Hardin, by his failure, willful neglect, and refusal to reside at the seat of government and perform the duties of secretary, has abandoned said office, and said office, in the judgment of the Governor, has become vacant for the cause aforesaid, it is therefore declared by the Governor and ordered to be entered upon the executive journal that the office of secretary has become and is vacant. Wherefore, to fill the vacancy, the Governor this day

commissioned George B. Kinkead, Esq., to be secretary till the end of the next General Assembly of Kentucky."

The Governor of Kentucky had the express power by statute to remove, but it was held the removal could not be made without the incumbent was first given the opportunity to be heard.

Chief Justice Tom Marshall delivered the opinion of the supreme court and said: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that in a government of laws a conviction whereby an individual may be deprived of valuable rights and the interests, and may, moreover, be seriously affected in his good fame and standing, implies a charge and trial and judgment with opportunity for defense and proof." 8 B. Monroe, 672.

The court further held in that case, as no other power existed to hear complaints, the secretary must first be charged in a judicial tribunal and denied the power of the Governor to arbitrarily remove before such hearing.

A very able discussion of executive power is to be found in State *ex rel.* Police Comm'rs *vs.* Prichard, 36 N. J., Law 114. In that case it was the duty of the Governor to fill vacancies. Certain police commissioners were convicted of a crime to cheat and defraud and were sentenced to pay a fine of $100 each. The attorney general officially advised the Governor that thereby their offices became vacant and recommended the appointment of successors, which was done. The incumbents denied that the offices were vacant and resisted the right of the Governor's appointees, and upon a proceeding in *quo warranto* the case came up before the supreme court. The power of the Governor was denied and it was held there must first be judicial determination of the fact of vacancy before the Governor could appoint.

The case is one worthy of careful study, and quotation is made at some length:

"It is obvious, therefore, that the Governor of this State is not possessed of a particle of judicial capacity. I cannot see that a single one of the powers conferred upon this high office even borders upon such authority. It is true that he is empowered to fill certain vacancies, and in doing such acts he must decide whether or not such vacancies exist. But such a decision is in no sense a judicial act. It is a mere assumption of the existence of a certain state of facts on which to base executive action. Such assumptions or determinations by a chief executive when they relate to or affect private interests have no binding force. If the executive should fill an office on the conviction that the incumbent was dead, it is presumed that in the mind of lawyers there would prevail no doubt that if the fact of death had not occurred the executive action would be void. An estoppel on private right by executive decision is not likely to be pleaded by any well-skilled counsel. I think there is no reasonable ground on which to base a claim for the existence of any right of judicature in the Governor of the State.

"And there can be as little doubt that the act of declaring that the offices involved in this case had been forfeited was a judicial decision. It had all the essential elements of such an adjudication. It was a determination of the fact, as well as the law, and comprised at once the functions of the jury and the judge, and it related to a right of property. The questions to be settled were whether the officer had misbehaved, and that was an issue of fact; and whether such misbehavior amounted to a forfeiture of office, and that was an issue of law. The point of fact required the introduction of evidence, and for this purpose the Governor had before him the record of the conviction of these defendants in a criminal court. Whether such record would be competent for the purposes for which it was used is open as a question of pure law to considerable uncertainty, the usual and inveterate rule being that a criminal record is not admissible in any suit or proceeding relating to property or the civil rights of persons. But it is enough to denote that here was presented a rule of evidence to be passed upon. In all its parts the proceeding was one of ordinary judicature. And then, too, after the ascertainment of the fact, it became necessary to apply the rule of law. The result was an announcement that the forfeiture had been incurred, and this clearly was an act of judicial discretion. Than the judgment of the judge there is no other legal test of the effect a certain act of misconduct has upon the right to office. What malfeasance will work a forfeiture is no part of the *lex scripta*. There is no statute upon the subject. It is obvious that it may well be that some convictions in a criminal court may not produce such a result. The point is not met by the suggestion that in this case the crime committed was one *malum* in use and made highly penal, because if the jurisdiction is vested in the executive on this occasion it belongs to him in all cases of official misdemeanor. It is not too much to say that of all the cases where there is room for the use of a graduated standard for judicial judgment the class of cases which comprises the one now considered is the most prominent. What jurist or judge has ever attempted to define that category of offences which in law are operative to deprive the wrong-doer of a public office? And yet such was the question upon which the executive was called upon to pronounce. These acts were judicial in the most rigorous sense of the term."

It will be observed from the authorities cited that in Cali-
57 fornia and Texas there is a direct denial in cases where the office is held by a fixed tenure of the power of removal as an incident of the power of appointment, while an overwhelming weight of authority elsewhere is to the effect that even when the power of removal for cause is expressly granted such authority cannot be exercised without the incumbent has first had in some form an opportunity to be heard in his own self-defense. This principle was recognized in *ex parte* Garland by the Supreme Court of the United States, 4 Wallace, at page 378, where it is said, speaking of attorneys as officers of the court: "They hold their office during good behavior and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity

to be heard has been afforded," citing *ex parte* Heyfrom, 7 Howard (Miss.), 127; Fletcher *vs.* Daingerfield, 20 Cal., 430. The removal from office not only deprives the possessor of a valuable private right and affects public interests, but it also implies wrong-doing and injures the good name of the incumbent. It would seem a first principle of justice that one should not be tarnished without opportunity to be heard in his own behalf. If the executive may at will direct the official to stand aside and enforce the demand it operates as a trial without notice and a judgment without evidence with no power for rehearing or appeal. Such eminent jurists as Treat, Marshall, Cooley, and others equally learned have denied the existence of such executive power.

The courts of last resort, some directly and others in effect, in Texas, California, Michigan, Kentucky, Rhode Island, and New Jersey have also refused their sanction to executive acts predicated on such an assumption. The whole theory of State governments is in favor of a division of powers and against concentration in the hands of a single person or department. Fixed terms, certain tenures, rights divested only after notice, evidence and trial tend to stability and the regular and orderly exercise of the functions of government by the different departments; whereas office held only at the will of a single person exercising authority above inquiry and whose conclusions are final and beyond the power of any other tribunal to review tends to arbitrary action and is not in harmony with the liberal spirit upon which our institutions are founded. Judge Campbell, in Dullam *vs.* Wilson, *supra*, said: "It is not satisfactorily shown that any different doctrine has ever prevailed in the United States, except in some isolated cases, and it would require a unanimity of decision, amounting to an entire removal of old landmarks, to justify the recasting of constitutional principles which underlie our whole system" and authorize us to give judicial sanction to the creation of a vacancy by executive fiat in an office with a fixed tenure, and thereby declare the forfeiture of a vested right without day in court, trial, judgment, or opportunity for appeal or review.

In the language of the learned supreme court of the State of Michigan, in the case last cited, it is proper to add that "in what has been said upon the law of this case there has been no wish or purpose to cast the least imputation on the motives of the executive. The same presumption of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the co-ordinate branches of the Government, and his motives are not the subject of criticism. No doubt he acted upon the impression that he was entirely within the line of his duty as well as of law, and that he believed the removal of the respondent was demanded by the best interests of the public service."

It is a very delicate task for one department of the Government to pass upon the acts of either of the other. It is, however, unavoidable, as the law has imposed upon the judiciary duties it cannot and should not seek to escape, but rather to discharge with the highest respect for the other departments and with the single purpose to

maintain only those principles of law firmly established by the weight of authority, well founded in justice, proper for the protection of human rights and the maintenance of that system which prevails that every one, however humble, shall be heard before he is condemned or his right denied. It is held that this proceeding was properly commenced in the court below by information in the nature of a writ of *quo warranto;* that the process properly issued on motion by order of the court; that it was rightfully made returnable at a day during the same term; that the court had jurisdiction to hear and determine the cause, and that Edward C. Wade was at the commencement of the proceeding and that Singleton M. Ashenfelter was not the lawful and rightful district attorney for the 3d judicial district, and that there is no error in the record.

The judgment of the court below is affirmed and costs taxed against the appellant.

ELISHA V. LONG, *C. J.*

I concur.

WM. H. BRINKER, *J.*

TERRITORY OF NEW MEXICO, *ss:*

Supreme Court.

I, R. M. Foree, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing 57 pages of printed and written matter is a true and correct copy of the record as well in the court below as in said supreme court and of the opinion of said supreme court in the case of The Territory of New Mexico *ex rel.* Edward C. Wade *vs.* Singleton M. Ashenfelter, *quo warranto.*

Seal Supreme Court, Territory of New Mexico.

In witness whereof I have hereunto set my hand and the seal of the said supreme court, at Santa Fé, New Mexico, this 27th day of July, 1887.

R. M. FOREE, *Clerk.*

[Endorsed:] 256. Territory of New Mexico *ex rel.* Edward C. Wade *vs.* Singleton M. Ashenfelter. Affirmed opinion by Long, C. J. (Copy.) Filed in my office this 21st day of Jan'y, 1887. R. M. Johnson, clerk. Recorded in vol. 2, p. 22.

[Endorsed:] No. —. S. M. Ashenfelter, appellant, *vs.* Territory of New Mexico *ex rel.* E. C. Wade, appellee. *Quo warranto.* Appeal from supreme court of New Mexico. Transcript.

Endorsed on cover: New Mexico supreme court. No. 390. Singleton M. Ashenfelter, appellant, *vs.* The Territory of New Mexico *ex rel.* Edward C. Wade. Filed September 5, 1887.

Office Supreme Court U. S.
FILED.
NOV 16 1889
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1889.

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
EDWARD C. WADE, *Appellee.*
No. 390.

*Appeal From the Supreme Court of the Territory of New Mexico.*

## Motion to Dismiss.

Now comes Edward C. Wade, the appellee in this cause, by Charles H. Armes, his attorney, and moves to dismiss the appeal for the following reasons:

1st. Because there is no Federal question nor question involving personal liberty involved in the decision of the Court below;

2d. Because the record shows that the amount involved is not sufficient to give this Court jurisdiction.

C. H. ARMES,
*Attorney for Appellee.*

To SINGLETON M. ASHENFELTER,
*Deming, Grant County, New Mexico:*

Take notice that, on Monday, the ninth day of December, 1889, or as soon thereafter as counsel may be heard, I shall call up and submit to the Court, the above motion.

C. H. ARMES,
*Attorney for Appellee.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
THE TERRITORY OF NEW MEXICO, *ex rel.*,
EDWARD C. WADE.
No. 390.

*Appeal from the Supreme Court of the Territory of New Mexico.*

## BRIEF FOR APPELLEE ON MOTION TO DISMISS.

The motion is based upon two grounds:

1st. That no Federal question nor question involving personal liberty is involved in the decision.

2d. That the amount is not sufficient to give this Court jurisdiction.

The record shows that a proceeding by information in the nature of a writ of *quo warranto* was instituted by the Territory of New Mexico in the District Court of the third judicial district of said Territory, at the relation of Edward C. Wade against Singleton M. Ashenfelter, on the 10th November, 1885, to determine the right of said Ashenfelter's claim to the office of district attorney for said district. It was shown by the affidavit and petition filed by the relator and by the answer of the respondent, that Wade was appointed by the Governor of said Territory to said office in March, 1884, for a period of two years, and that said

appointment was confirmed by the legislative council of said Territory. That Wade entered upon and performed the duties of said office until the 9th November, 1885, when said Ashenfelter claimed the same and took possession thereof under color of an appointment made by said Governor.

The answer of Ashenfelter to said information was filed pursuant to a rule which was made returnable to the same term of court, but before answering, said Ashenfelter moved to discharge said rule upon three grounds as follows:

"*First.* Because the Court has no jurisdiction over the subject-matter, and no power to proceed by information, and can only proceed to try the right of office by the original writ of *quo warranto*, and not by information in the nature of a *quo warranto.*

"*Second.* The process issued in this cause is an original writ issuing out of this Court, and could only be made returnable at the next succeeding term after the same was issued, whereas the writ issued in this case was made returnable at the same term at which it was issued.

"*Third.* Because the Court, as appears upon the face of the information and the writ, has no jurisdiction either of the subject matter in controversy, or of the person of the defendant." (See Pr. rec., pp. 8 and 24.)

This motion was overruled by the District Court and Ashenfelter excepted, and thereupon filed his answer to said information, whereupon, on the 21st November, 1885, upon motion of the relator's counsel, judgment was rendered in the District Court in favor of the relator, and against the respondent, (Pr. rec., pp. 11-12.) and the respondent then moved as follows: "To set aside the findings herein, and to grant a new hearing, because—

*First.* The said findings are not in accordance with law.

*Second.* Because said findings are contrary to law.

And further moves the Court to arrest the judgment herein—

"*First.* Because the Court cannot hear or determine this question upon the proceeding in the nature of a *quo warranto.*

"*Second.* Because this Court has no jurisdiction of the subject matter." (Pr. rec., p. 12.) Whereupon an appeal was taken to the Supreme Court of said Territory, which Court, at the January, 1887, term, affirmed the judgment of the District Court (pr. rec., pp. 16, 17), and said Ashenfelter, respondent below, appealed to this Court. (Pr. rec., p. 16.)

The judgment of the Supreme Court was as follows:

This cause having been submitted to and taken under advisement by the Court at a former term, the Court now, being sufficiently advised in the premises, announces its decision by Chief Justice Long affirming the judgment of the Court below for reasons stated in the opinion on file, Associate Justice Brinker concurring. It is therefore considered and adjudged by the Court that the judgment in this cause of the third judicial district Court sitting within and for the county of Sierra, whence this cause came into this Court, be, and the same hereby is, affirmed, and that in accordance therewith the said defendant, Singleton M. Ashenfelter, is not entitled to the possession of the said office of district attorney of the third judicial district of the Territory of New Mexico, and that he unlawfully holds the same and exercises the powers and functions thereof without authority of law; that said relator, Edward C. Wade, is the lawful district attorney for said third judicial district of said Territory and lawfully entitled to the possession of said office and to exercise the powers, perform the duties, and receive the emoluments thereof; and it is further considered and adjudged that the said Singleton M. Ashenfelter surrender said office and the possession thereof to said Edward C. Wade, and the said Singleton M. Ashenfelter be, and he hereby is, ousted therefrom: and it is further considered and adjudged that Singleton M. Ashenfelter pay the costs of this proceedings, as well in the lower Court as in this court, to be taxed, and that execution issue therefor.

* * *

## ARGUMENT.

### I.

To give this Court jurisdiction of appeals from the Court below "the value of the property or the amount in controversy" must exceed fine thousand dollars, or a Federal question or a question of personal liberty, must be involved.

Snow *vs.* United States, 118 U. S., 346.

The questions presented for the decision of the Supreme Court of the Territory are stated in the opinion of that Court (see pr. rec., p. 25), as follows:

"*First.* Did the Court below err in overruling the motion to quash and in taking jurisdiction over the person and subject matter and in proceeding to hear and determine the case.

"*Second.* Did the Court err in its final judgment.

"Upon the first alleged error appellant contends:

"*First.* That if any tribunal in this Territory has jurisdiction it is the supreme and not the district court.

"*Second.* If any remedy exists to redress the wrong complained of, it is not on information, but by the original writ of *quo warranto.*

"*Third.* That in any event the respondent should not have been required to appear at the term when the information was filed, but at a subsequent one."

The questions *decided* by that Court are stated in the concluding part of the opinion (see pr. rec., p. 49), as follows:

"It is held that this proceeding was properly commenced in the court below by information in the nature of a writ of *quo warranto;* that the process properly issued on motion by order of the Court; that it was rightfully made returnable at a day during the same term; that the Court had jurisdiction to hear and determine the cause, and that Edward C. Wade was at the commencement of the proceeding and that Singleton M. Ashenfelter was not the law-

ful and rightful District Attorney for the 3d judicial district, and that there is no error in the record."

The above are the only questions involved, and the case is within Pratt *vs.* Chumasero, 92 U. S., 358.

It is respectfully submitted that the decision of the Court below involves no Federal question whatever. It is true that the appellant, in his petition for an appeal to this Court claims that an act of Congress, is, in some unexplained way, involved in the decision.

The petition states substantially *that the authority exercised by the Governor under certain acts of Congress and under an act of the Territorial Legislature, of appointing Ashenfelter and of removing Wade, was not conferred upon or possessed by said Governor under and by virtue of said acts of Congress;* but it is difficult to perceive that any act of the Governor in the case does involve a construction of any law of Congress.

Upon the question of jurisdiction of the district court it was contended by the appellant that that Court had no jurisdiction to try the case on an information in the nature of a writ of *quo warranto.* It appears from the opinion of the Court that the act of Congress here relied upon is the portion of the organic act which reads as follows:

"The district courts shall possess chancery as well as common law jurisdiction." (Pr. rec., p. 25.)

The Supreme Court of the Territory, in deciding that the district court had jurisdiction, did not deny the validity of this act of Congress. Other rules of law governed the Court in reaching its conclusion.

When a claim is made under an act of Congress, but the decision below rests upon common law rules, this Court will not take jurisdiction.

Carpenter *vs.* Williams, 9 Wall., 785.

Bank *vs.* McVeigh, 98 U. S., 332.

It further appears from the opinion of the Court that section 1841, R. S. U. S. was referred to as giving authority to the Governor to make this appointment. So much of the section as is pertinent to this discussion reads as follows: "The executive power of each Territory shall be vested in a governor who * * * shall commission all officers who are appointed under the laws of such Territory, and shall take care that the laws thereof be faithfully executed."

While this law was referred to by the court below in its opinion, it was not necessarily involved in the decision. It was not relied upon in either the petition or the answer, nor anywhere in the record, *nor was the validity of any statute of the United States drawn in question nor the validity of an authority exercised under the United States, drawn in question.*

Snow *vs.* United States, 118 U. S., 346.

See Kennebeck R. R. *vs.* Portland R. R., 14 Wall., 23.

R. R. Co. *vs.* Rock, 4 Wall., 177..

Boughton *vs.* Exchange Bank, 104 U. S., 427.

The claim of the appellant stated in the record is based upon "an act of the Legislative Assembly of the Territory of New Mexico," which provides for the appointment to said office of District Attorney by the Governor (see pr. rec., p. 9, 10), and the decision involves a construction of the Territorial law only. There was no denial by the Court of the validity of the act of Congress thus referred to.

But a denial of the validity of an act of Congress, in a motion for an order allowing an appeal to this Court, would not raise a question *on the record* so as to give this Court jurisdiction.

Brown *vs.* Colorado, 106 U. S., 95.

Susquehanna Boom Co. *vs.* West Branch Co., 110 U. S. 57.

II.

The matter in dispute is the right to an office, and its value cannot be ascertained from a commercial standpoint, and cannot be computed in dollars and cents.

See Botts *vs.* Chumasero, 92 U. S., 358.
Kurtz *vs.* Moffett, 115 U. S., 487.

Respectfully submitted,

C. H. ARMES,
*Attorney for Appellee.*

---

I do solemnly swear that on ninth day of November, 1889, I deposited in the mail at Washington, D. C., a copy of the above motion, notice and brief, duly stamped and addressed to said Singleton M. Ashenfelter, at DEMING, Grant County, New Mexico, the same being, as I am informed and believe, his post office address and place of abode, and that I have also mailed to the present address of F. W. Pennybaker, late counsel of said Ashenfelter, a copy of said motion, notice and brief, and that said Ashenfelter has no present attorney in said case, so far as I have personal knowledge or information.

CHARLES H. ARMES.

Sworn to and subscribed before me this 9th day of November, 1889.

HOWARD C. CLAGETT,
[SEAL] *Clerk Police Court D. C.*

Office Supreme Court U. S.
FILED,
DEC 3 1889
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States,

October Term, 1889.

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
THE TERRITORY OF NEW MEXICO *ex rel.*
EDWARD C. WADE, *Appellee*,
No. 390.

*Appeal From the Supreme Court of the Territory of New Mexico.*

## BRIEF OF APPELLANT
ON
## APPELLEE'S MOTION TO DISMISS.

C. W. McKEEHAN, *Attorney for Appellant*

IN THE

# Supreme Court of the United Stat

October Term, 1889.

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
THE TERRITORY OF NEW MEXICO *ex rel.*
EDWARD C. WADE, *Appellee*,
No. 390.

*Appeal From the Supreme Court of the Territory of New M*

## BRIEF OF APPELLANT
ON
## APPELLEE'S MOTION TO DISMISS.

The statement of the case presented in Appellee's b on this motion, is but partial.

The argument in Appellee's brief does not bear upon the rael issues shown by the record.

The United States statute regulating appeals from Ter torial Supreme Courts, approved March 3, 1885, (23 Stat. Large—1884–5, p. 443) provides:

Sec. 2—That the preceding section shall not apply to a case wherein is involved the validity of any patent or copy or in which is drawn in question the validity of a treaty or ute, or of an authority exercised under the United States, in all such cases, an appeal or writ of error may be bro without regard to the sum or value in dispute.

It will hardly be questioned that the authority exerc by the Governor of a Territory is "an authority exer under the United States." Sec. 3 of the Organic Act est lishing New Mexico (Sec. 1841 Revised Statutes U. S., p.

Appellee squarely denies the authority, or the right to exercise it under a given state of facts, and the issue can be determined only by the court entertaining jurisdiction and inquiring into those facts. In this case it is shown, too, (Pr. rec. p. 8 fol. 17) that jurisdiction of the court below over the person of the defendant and appellant is denied.

Again, in Carpenter vs. Wiliiams, 9 Wall. 785, (also referred to in Appellee's brief) Mr. Justice Miller says: "The decision of the court below denies the validity of no act under the United States." But in this case the decision of Long, C. J. (Pr. rec p. 40 fol. 56) denies the validity of the Governor's appointment and commission to Appellant under section 1841 Revised Statutes of the United States, and brings forward, as the main feature of this case, the issue as to whether the language of said section 1841 gives *"authority to the executive to make this appointment."*

Respectfully Submitted,

C. W. McKEEHAN,

*Attorney for Appellant.*

Office Supreme Court U. S.
FILED.
OCT 18 1890
JAMES H. McKENNEY.

No 390.

# In the Supreme Court

## OF THE UNITED STATES.

OCTOBER TERM, 1890.

---

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
THE TERRITORY OF NEW MEXICO, *ex. rel.*
EDWARD C. WADE, *Appellee.*
} Quo warranto.

---

Appeal from the Supreme Court of the Territory of New Mexico.

---

# BRIEF OF APPELLANT.

C. W. McKEEHAN,
Attorney for Appellant.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1890.

SINGLETON M. ASHENFELTER, *Appellant*,
*vs.*
THE TERRITORY OF NEW MEXICO, *ex. rel.*
EDWARD C. WADE, *Appellee.*
} No. 390.

Appeal from the Supreme Court of the Territory of New Mexico.

## BRIEF OF APPELLANT.

This is a suit by Information in the nature of a Quo Warranto, brought by the Territory of New Mexico upon the relation of Edward C. Wade, and against Singleton M. Ashenfelter, for the purpose of testing right to the office of District Attorney for the Third Judicial District of New Mexico, and the authority of the Governor of the Territory, under United States laws, to remove an incumbent from said office, and fill the same with a new appointee. Cause is brought up on appeal, Ashenfelter being appellant.

The record shows that this office of District Attorney exists "under the laws of the Territory." Pr. Rec. p. 4. fol. 8. Mr. Wade was commissioned March 11, 1884. Mr. Ashenfelter's commission bears date October 28, 1885. The court of original

jurisdiction held, on presentation of the latter commission, that the acts of the executive co-ordinate branch of the government, were entitled to full credit as presumably within the authority of law, and therefore accorded recognition to Mr. Ashenfelter. The latter being in office, Mr. Wade brings his suit as aforesaid.

The pivotal question is as to the power of the Governor to *remove* the relator from the office of District Attorney of the Third Judicial District, in recess of the Territorial Council.

Subordinate to, and entirely disconnected from this question, is the further inquiry as to the power of the Governor to fill the vacancy thus created by the temporary *appointment* of appellant in recess of the Council.

## POWER OF REMOVAL.

The position of appellant, may be thus briefly stated:

1st. The Organic Act vests in the Governor the power "to nominate, and by and with the advice and consent of the legislative council, appoint," etc.

Sec. 8 Act establishing New Mexico, approved Sept. 9, 1850; sec. 1857 Rev. Stat. U. S.

2d. The power of removal is a necessary legal adjunct and

incident of the power of appointment, and must accompany it in all cases where it is not by law taken away.

3d. The power of appointment conferred upon the governor by and with the advice and consent of council, constitutes the governor alone the removing power in recess of the council, as a settled and practical question of power.

4th. This power of removal, if derived from the Organic Law, cannot be divested by territorial legislation under the guise of fixed terms of office, or by prescribing grounds for removal.

To establish and maintain these propositions we must recur to federal, and not state courts and decisions.

The act of congress passed in 1850 establishing New Mexico, is a federal act, and not only is it modeled upon the federal constitution, as to the system of government provided, but in the particulars here in question, it is almost a literal copy; and the construction and effect given to the one must necessarily attach to the other, regardless of state or local decisions upon questions similar, but not identical.

"The executive power shall be vested in a president." Art II, Sec. I; Constitution U. S.

"The executive power and authority in and over said territory of New Mexico shall be vested in a governor."

Organic act, Sec. 3, Sec. 1841, p. 326 R. S. U. S.

"He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

Art. II, Sec. 3, Const.

"He shall commission all officers who are appointed under the laws of the Territory and shall take care that the laws thereof be faithfully executed."

Sec. 1841, Rev. Stats. U. S.

"He shall nominate and by and with the advice and consent of the sen ate shall appoint. * * "

Art. II, Sec. 2, Par. 2, Constitution.

"The Governor shall nominate and by and with the advice and consent of the legislative council, shall appoint. * * "

Sec. 1857, Rev. Stats. U. S.

The rule is invariable and indisputable that where words, phrases and sentences have acquired through authoritative interpretation, a definite meaning and signification, they will, when used in a subsequent enactment, be conclusively presumed and held to be used in the same sense, unless a contrary intention appears from the act.

Cooley's Cons't'l Limitations, page 52.
Smith's Cons't'l Law, Sec. 482.
The "Abbotsford," 98 U. S., 440.
McKee vs. McKee, 17 Md., 352:
8 Mass., 472.

A constitutional provision borrowed by Nevada from Indiana, takes with it the construction given in Indiana.

Hess vs. Pegg, 7 Nevada, 717.

Further authority is not needed—in fact, this proposition is beyond dispute.

It remains then to determine what authoritative and controlling construction, if any, had been given to the constitutional provision relating to the powers of the President to *remove* officers appointed by and with the advice and consent of the senate, prior to the incorporation of the same power into the Organic act of New Mexico.

This opens up a controversy which began while the Constitution was under discussion, and has lasted to the present day.

Time and space will not permit a review of the conflicting views held and advocated by the greatest minds of the country.

We submit that the lawful power and authority of the President, during recess of the senate, whether for a fixed or an indefinite term, was authoritatively and practically determined and settled in 1789, during Washington's administration, and has been exercised, without let or hindrance, ever since; and in 1850, when the Organic Act was passed, this power, as an incident of the Constitutional power of appointment, had become interwoven into the fabric of government, and was established as one of the powers vested in the executive, as authoritatively as the power to grant reprieves and pardons.

to remove officers appointed by him by and with the advice and consent of the Senate,

2 Story Constitution, Secs. 1537–1538–1549–1554.
1 Kent's Comm., p 316.
Andrew's Manuel of the Constitution, p. 179.
Paschal's Ann. Const'n, p. 181, 185.
Stanberry on Appointment to offices, 1419.
Cooley on Const'n'l Lim., p. 69.
Annals of Congress, Vol. I, pp. 385 to 412, 476 to 572.
5 Opinions of Attorneys General, 288.
3 " " " " 673.
4 " " " " 603–608–609.
7 " " " " 186.
Stewart vs. Laird, 1 Cranch, 299.
U. S. Senate Journal, July 18, 1789, p. 42.

The exercise of like power in the executive of a state is, upon the same principle, recognized and sustained.

Lehman vs. Southerland, 3 Serg. & Rawle, 145.

It is vain to look for controlling judicial decisions in any Federal court, for none exist; and we are left to the fixed practical construction acquiesced in by every department of the government, and yielded to by the courts, from first to last.

*Obiter dicta* and adverse criticisms are not wanting, but no Federal court has ever decided against this constantly asserted and exercised power of removal.

*Marbury vs. Madison,* 1 Cranch, 137–155,
was decided upon the question of jurisdiction of the court; and it will be observed that Thomas Jefferson, then President, expressly declined to accept the views advanced gratuitously by the court; and the authority, even at that early day, recognized as too well established to be overthrown, was maintained and exercised

*Ex Parte Hennen*, 13 Peters, 256
recognizes the power of removal as a legal incident of the constitutional power of appointment. In that case there was no fixed term of office.

*U. S. vs. Guthrie*, 17 Howard, 284, was the case of a territorial judge appointed for four years, with no reservation as to removal. The supreme court declined to take jurisdiction by mandamus, and the dissenting opinion of Judge McLean, so far from being authority, falls short in eloquence and argument, of those of his many great predecessors who shared his views and endeavored, as he did, in vain, to combat the rock-rooted precedents.

See also: 4th *Elliot's Debates*, 350.
*Gratiot vs. U. S.* 1 N. & H. 253.

In *Avery vs. Bigler*, Deady's R, 206,
U. S. District Judge Deady ably reviews the history of this conflict of views from its inception, and although, as an individual, sharing the views of Alexander Hamilton, as a judicial officer he decides (in 1867) "the power of removal must be conceded to the executive by the courts. Congress had practically so conceded it for three-fourths of a century."

It will be observed that nowhere was the power of the president and senate conjointly to remove officers apppointed for an indefinite term, ever seriously even questioned.

The contest begun and settled in congress in 1789, was upon the broad doctrine to be practically applied to the exercise of the constitutional powers of the executive, that the president had the power, in recess of the senate, at least in the

absence of any congressional legislation, to remove any public officer appointed by him with the concurrence of the senate, whether such appointment was for a fixed term or not. And this was the construction then reached, and now for nearly a century recognized and established.

Many statesmen and jurists, including Calhoun, while accepting the result arrived at, as an accomplished fact, maintained that congress might by law take away or regulate this so-called arbitrary power, but this view assumed no practical form until the enactment of the Tenure of Office act, in 1867.

The constitutionality of this act, so far as it attempted to divest the executive of the incidental but the constitutional power of removal, was tested before the highest tribunal known to our government: the Senate, presided over by the Chief Justice of the Supreme Court of the United States.

The facts charged in articles 1 and 2 of the impeachment of Andrew Johnson, that he had in disregard of that act of Congress, removed a public officer who had been appointed by the president, by and with the advice and consent of the senate, and duly commissioned for a fixed and definite term of office, were fully admitted.

The defense was that the removal was the exercise of a constitutional power, beyond the power of congress to destroy.

This was the clear and sharply defined issue.

The ability, learning and eloquence displayed, the solemn and deliberate judgment arrived at, should place this executive power of removal, as a question pertaining to the Federal government, beyond cavil or dispute.

Impeachment of Andrew Johnson, vol. 2, p. 315.

It may be remarked that the very passage of the Tenure of Office act, was an express recognition of the prior power of removal.

"The purpose of that act was to *change the doctrine* by which the president alone could remove."

Digest Opinions, Attorney General (1880), p. 295.

The principle that the power of removal is a legal incident of the power of appointment is expressly recognized in

Blake vs. United States, 103 U. S. 236.

It should be noted that on Oct. 28, 1885, the date of appellant's commission, the Council was not in session. New Mexico had no Legislature that year.

No express legislative attempt to restrict the inherent power of removal by the governor has ever been made in New Mexico, where, of course, the Tenure of Office act has no application.

The powers of the executive remain as conferred in 1850, and, as conceded by appellant, it is wholly unimportant whether the legislature has fixed to an appointive office any definite term and tenure or not.

The Organic Act, in the identical language of the constitution, conferred this power, and nothing short of an act of Congress can divest him of it.

It will be time enough to determine the constitutionality of an act of the legislative assembly attempting to deprive the governor of the power of removal, when such an act shall be be passed. None such is now upon the statute books. New Mexico has not and never had a tenure of office act.

POWER TO FILL VACANCIES.

This power in the President is derived from the 3 Par., Art. II, Sec. II, Const. U. S. It is entirely distinct from the power of appointment for a full term, and rests upon wholly independent ground.

This provision of the constitution was not incorporated in our Organic law.

The power, however, is vested in the Governor of this Territory, by act of January 25, 1854, Comp. Laws N. M., 1884, Sec. 1740, which has been in force unchanged for over thirty years, and is in language as follows: "In all cases wherein the governor is or may be authorized by law to make appointments by and with the advice and consent of the Council, he is hereby authorized to make temporary appointments during the recess of the Legislative Assembly, to continue until the meeting of the same."

The legislative power extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

Sec. 1851, R. Stat. U. S.

If the Organic Act does not expressly or by necessary implication restrict or deny the power to fill vacancies occurring

during recess of the Council, it is undoubtedly a rightful subject of legislative power.

Fish vs. Rogers, 1 Montana, 260.
People vs. Oulton, 28 Cal., 44.
Same vs. Tilton, 37 Cal., 618.
Bourland vs. Hildreth, 26 Cal., 161.

It is everywhere recognized as within the scope of valid Territorial legislation.

The only case relied on as denying this power is that of

*In re Attorney General*, 2 New Mexico, 52.

This case cites only the Montana case, *supra*, in support of the opinion, and we submit, overlooks the legislation of Montana as compared with that of New Mexico.

It will be observed that the majority of the Montana court denies the power of filling vacancies by the Governor, upon the express ground that the territorial act of 1867, which conferred that power, had been in terms repealed by the act of 1868. Even in the absence of a statute, the court concedes that were the office one closely connected with the executive department, necessary to its administration, the Governor would have the power in question upon the doctrine *ex necessitate*, and in discharge of his duty to "see the laws faithfully executed," but the court, holding that the office of Territorial Auditor was not of that character, decides against the power.

It is declared in the opinion unmistakably, that had the legislature not repealed the act of 1867, the power of filling the vacancy would have been undoubted.

The opinion in the Fiske-Waldo controversy, while of course authority upon the question of power to fill vacancies, upon

the principle of *stere decises,* was certainly not binding upon the the Supreme Court of the Territory as *res adjudicata.*

Cooley's Const'l Lim., p. 48.

The doctrine of *stere decises* has its greatest force and application where the decision has become a rule of property, and not where public questions are involved, such as the possession of an office, in which no vested property rights are concerned.

Cooley's Const. Lim., p. 52.

In the case in question our Supreme Court holds in substance that the act of 1854 was invalid as conflicting with the Organic Act, and that it was repealed by the act of Congress of June 8, 1872, sec. 1859 R. S. U. S.

We contend that neither of these positions can be sustained. As to the first, the Montana case relied on, is directly the other way, as are all the decisions above cited.

It is fundamental that in construing a legislative act, the court should consider all the facts and circumstances existing at the time, in order to arrive at the intent of the law-makers.

The act of June 8, 1872, was not local to New Mexico, but applied to all the territories alike.

In New Mexico the act of 1854 was in force, empowering the Governor to fill all vacancies from whatever cause, occurring in recess of the council.

In Montana there was no provision whatever for such event.

What the situation was in other territories we are not advised, and it is immaterial, as these two illustrate the intent of Congress.

The act of Congress simply makes it the *duty* of the Governor to fill vacancies in a certain class of offices happening in recess of the council, from *death* or *resignation.* It is an *affirmative* act, con-

tains no hint of a repeal of any existing laws, and not a single *negative* word to express that any powers existing under the laws of any territory, not in conflict with its terms, and extending to vacancies happening from other causes than death or resignation, should be repealed.

The maxim of "*expresius unius* &c," upon which appellee relies, has no application to the rules of construction governing two affirmative statutes relating to the same subject.

On the contrary the rule is universal and fundamental that such statutes must be construed in such manner that both may stand, and no repeal by implication is favored; but to effect the repeal, the conflict must be direct and manifest.

Dwarris on Stat's, 175.
Bacon's ab., Vol. 9, 234.
Cooley's Const. Lim. 184.
2 Ohio, (St), 607.
Sedgwick on State and Con. Law. 39–4.

I deem it well to support this brief with the following extracts from the brief submitted in Territorial Supreme Court:

A DISTRICT OFFICE.

The office of District Attorney for the Third Judicial District of New Mexico is clearly a District office, as distinguished from a Territorial office.

Words in statutes not having a technical or adjudicated legal meeting are to be construed according to their natural and ordinary signification, and their common uses.

Cooley's Const'l Lim. 56.

McCool vs. Smith, 1 Black, 459.

Opinion of the Justices of Mass., 523.

Rich vs. Keyser, 54 Pa. St. 86.

U. S. vs. Warner, 4 McLean, 463.

Maillard vs. Lawrence, 11 Howard, 251.

Webster defines "district," as a definite portion of a state or city for legislative, judicial, fiscal or elective purposes.

Bouvier's law dic., p. 491, "District, a certain portion of the country separated from the rest for some special purpose."

"An officer chosen or appointed for a limited division of a county or of the Territory, such as a * * * judicial district, is a district officer."

Duncan vs. McAllister, 1 Mich. p. 88.

The Organic Act, itself, uses the word "district," in connection with political and geographical subdivisions of the Territory, in such manner as to show clearly that the word was not intended to designate a sub-division less in extent or area than a county.

Sec. 16, p. 53, Comp. Laws, 1884.
" 5 " 48, " " "
" 1847 " 58, " " "
" 1849 " 59, " " "
" 1865 " 62, " " "
" 2004 " 69, " " "

The "counties south of the Jornado del Muerto," as described

in the act of 1863, certainly constitute a subdivision of the Territory, and have ever since been recognized as the Third Judicial District.

It is for this District alone that this District Attorney is appointed. He must reside in it, and can perform no official acts outside of it.

It is not essential, in our view, to determine whether the District Attorney is a territorial officer or a district officer in the case at bar.

If a territorial officer, as claimed by appellee, his appointment and consequently the power of removal is vested in the Governor directly by the Organic Act, and the legislature cannot divest it.

If a district officer, the legislative assembly in this instance have conferred the same powers upon the Governor, and by the use of the same words.

The only difference in the two classes of officers is that in case of district officers, the legislature possessed the power to prescribe whether they should be elective or appointive, and the manner of election or appointment.

In the exercise of this power the legislative assembly might have defined and limited the power of the Governor to remove, but not having done so, the power remains as effectually as if conferred directly by Congress instead of through the medium of the legislature.

The act of Congress of 1872 relates only to officers appointed by the Governor under the Organic Act, but as we contend that that act effected no repeal of the legislative act of 1854, there is in effect no difference in the two classes of offices, as affecting either the power of removal, or the power to fill a vacancy.

TERM NOT FIXED.

"The power that creates can abolish, in the absence of constitutional restrictions." The power to remove is an incident to the power to appoint." It can be abridged only by two events: First, by fixing the tenure; and, second, by providing

other adequate means for displacing the incumbent during his term. 7 California 102.

We claim in brief that the act of January 28, 1863, (Rev. Laws, 1865, p. 88), which created the office of district attorney and assigned them and the attorney general to their several jurisdictions, was the substitution of a new system for that previously existing, and that no term of office was fixed.

Whatever view be taken of the Pandora's box, called the "Revised Laws of 1865," which contains the various laws previously enacted, with their several dates and titles, from the Kearney code to the act of 1863, it is certain that the universal rules of construction adopted for the purpose of determining the legislative intention, apply to this collection of statutes.

It is doing violence to common sense to say that the legislature in 1865 enacted and revivified at one and the same time the Kearney code, (p. 82), the act of Feb. 2, 1859, (p. 86), the amendatory act of Feb. 2, 1862, (p. 86), and the act of January 28, 1863 (p. 88.)

Each of the acts provided for a system of law officers. Each in turn superceded the preceding until that of 1863 was enacted, which has remained, except so far as changed in 1884, which act, like that of 1863, creates another office of district attorney, and fixes no term of office.

It is attempted to patch up a term of office for the district attorney by selecting special provisions of the preceding statutes, and by means of a pleasant fiction, engrafting them upon the act of 1863.

It is undoubtedly true that acts *in pari materia* are to be so construed that if possible both or all may stand, because such is deemed the intent of the legislature in the absence of a repealing clause or in the absence of repugnance between them. It is equally true, however, that where a subject or system is established by a statute, a subsequent act embracing the same subject and establishing a different system, supercedes or re-

peals the former as a whole, although there may be special provisons not repugnant contained in it.

Sacramento vs. Bird, 15 Cal. 294.
State vs. Conkling, 19 Cal. 501.
Swan vs. Buck; 40 Miss. 268.
Daviess vs. Fairbairn, 3 Howard (15 Curtis) 575.
School District vs. Whitehead, 13 N. J. (Eq) 290.
Gorham vs. Luckett, 6 B. Munroe (Ky.) 146.
Storman vs. State, 21 Texas 734.
Rogers vs. Watrous, 8 Texas 62.
Commonwealth vs. Cowley, 1 Ashm. (Pa.) 171.

A specified term of office is not to be created by implication. Wherever the legislature created one of these offices and intended to fix its term, words have been used plainly showing such purpose, and the omission in the act of 1863, which established the office of district attorney, to prescribe any duration, was intentional and deliberate.

Nor can the general provision as to "all laws applicable to the Attorney General, etc.;" in the act of Feb'y 8, 1862, be held to incorporate the special provisions as to term of office, of the Attorney General, into the act relating to district attorney.

We submit that the act of 1863 is the latest expression of the legislative will, and must control the question at issue.

---

But I insist that this is a question relating to an act of Congress passed in the exercise of constitutional powers, and is to be judged by federal precedents and authorities, and not by the standard of any local or state decisions.

And, further, that there is a grave misapprehension as to the object and effect of the act of congress, which under express authority of the constitution, in establishing sundry offices, fixed the period of their duration. I invite reference to the debates of the first congress on the question and insist in the language of Thomas Jefferson that frequent recurrence

to first principles is essential to the comprehension of organic laws and the preservation of the cardinal doctrines of government. In the consideration of the powers of the executive over appointees, made by and with advice and consent of the senate, including the bureau officers—(the Cabinet) it became a matter of controversy whether the specification of a period for which officers should hold places created by congress would interfere with the right of the President to remove such incumbents—at will even, and Mr. Madison vigorously maintained that the congress in defining the limit of the appointees' incumbency, did not intend to abridge or interfere with the President's control over such appointees (by removal) but designed, as was its right and duty, to require all appointments to be submitted to the Senate for consideration periodically, in order to prevent the continuance in office of unfit persons, at the will of the President to the detriment of the public interest—parasites shielded by executive partiality, innocently it may be, but yet to the harm, sometimes to the discredit, of the government.

Mr. Madison saw that the congress in prescribing the term of office did not mean that the office should be held for that time whether the President was willing or not—but that it should not be held longer without the consent of the Senate, even if the President so willed; that, as with the Senate was deposited by the constitution, the duty of revision and the right of approval or rejection of all appointments and in this trust, was contained the responsibility of preventing unworthy selections, there should be at least quadriennally (the Presidential term) the opportunity for the senate to pass upon the appointments. We urge that these views embody the philosophy of the true relations of the respective departments of our government—that they recognize the rights and necessities of each, and are promotive of the weal of the people in protecting them against officers, worthy at the time of their appointments, but subsequently faithless or inefficient—by the power of removal by the President during the vacation of the Senate—and by the requirement that the Senate shall review every appointment each four years. We protest, too, that

under the operation of these principles there is much less liability to damage to the public by an abuse of executive prerogative, than there is of danger to the public service in the error that a public office is a private right—to be possessed independently of the appointing power, because for a fixed term.

C. W. McKEEHAN,
Attorney for Appellant.

634 Drexel Building,
Philadelphia, Pa.

To the Supreme Court of the United States:

The petition of George Bailey; Horace H. Chittenden, as assignee of Alfrederick H. Hatch; Charles R. Harrington and William Anderson, as executors of David Carll, deceased; Franklin Osborn, Charles Osborn, John A. Laird, Jane Laird, Charles H. Valentine, William H. Bailey, George W. Piper; S. E. Birdsall, as executor of Lemuel H. Hopkins, deceased; and Euphemia Osborn, as administratrix of Lucian Osborn, deceased, respectfully shows:

That, for the reasons hereinafter set forth, your petitioners pray this Honorable Court to issue its **certiorari** to the United States Circuit Court of Appeals for the Second Circuit, pursuant to the Act of Congress entitled "An Act to establish Circuit Courts of Appeals "and to define and regulate in certain cases the juris- "diction of the Courts of the United States, and for "other purposes:" approved March 3, 1891; requiring said Court of Appeals to certify to this Court its proceedings in the cause *in admiralty* between your petitioners and one John P. Sundberg *(a certified copy of the record whereof is herewith filed and a copy hereto annexed)*, lately unjustly decided against your petitioners as by said Circuit Court of Appeals, and as reasons for so praying your petitioners allege the following specifications:

**I. That the said Circuit Court of Appeals and the Judges thereof have arbitrarily, willfully and unjustly refused to apply the law of the land to your petitioners' case.**

The only reason assigned by said Circuit Court of Appeals for so refusing is in the following words (found at p. 36, fol. 107 of the Transcript of Record):

"The opinion of the Circuit Court of Appeals did "not discuss the question how far, if at all, the con-

" clusiveness of the judgment would be affected, as to " respondent, by the fact, if it were a fact, that it was " secured by his deliberate perjury. Upon the motion " for reargument that point was the sole one made. **" The Court of Appeals denied the motion " because its members were not satisfied " that the Supreme Court intended by the " language they used in Marshall vs. " Holmes,** 141 U. S., 589 (the forged document case), **" to repudiate or modify the well-settled " doctrine expounded in U. S. vs. Throck- " morton,** 98 U. S., 61, **that the conclusive- " ness of a judgment was not to be ques- " tioned, when pleaded in another suit, " solely becouse it had been procured by " perjured testimony.**

That while so stating their *conception* of the law, Judge LACOMBE, the Circuit Judge who expressed their views, further said in reference to the amendment of petitioners libel granted *(but subsequently annulled)* by him :

" I allowed the amendment, **conceiving it was " but just that the final record should con- " tain sufficient averments to enable the " Supreme Court, should libellant eventu- " ally succeed in getting the case there, to " pass upon the point considered by the " Court of Appeals, but** (as I thought) **not " fully disclosed on the record "** (fol. 109).

And petitioners refer this Court to the printed brief of the petitioners (as libellants) used before said Circuit Court of Appeals *hereto annexed* for the reasons and arguments which show the willful error of said Court, and especially to pages 7 to 12, where it is shown that **Admiralty Law is the Civil Law,** and to pages 13 to 15, where the **Civil Law** *is extracted from the* **CORPUS JURIS CIVILIS,** by which it is shown that **such civil law requires the Court to avoid a judgment obtained by**

**perjured evidence**; and to pages 17 to 22, where the decisions of this Court in Marshall vs. Holmes and Throckmorton vs. U. S. are compared.

That on November 9th, 1893, the petitioners' appeal from the order of the Circuit Court of December 10, 1892 (fol. 115), striking their amended libel from the files, was called for argument, and petitioners' counsel was then heard in a *perfunctory* manner by the Circuit Court of Appeals, composed of Judges WALLACE and SHIPMAN, and that the said Court, without hearing opposing counsel and without taking time to examine the law or authorities cited on the brief of counsel, or writing any opinion, or expressing any reasons therefor (beyond the statement by Judge WALLACE that the Court would not have time to try all the cases if they had to try them over, to which said counsel responded that the *issue of perjury or no perjury had never been tried*), on the spot affirmed said order.

## II. That the said Circuit Court of Appeals, and the Judges thereof, have acted unfairly and unjudicially in reference to said cause.

In making this charge the petitioners are fully aware of the *gravity* thereof, and make it with deep regret that cause exists therefor, and because they have been arbitrarily refused the benefit of the law of the land by said Judges, as to whom they are substantially without redress, except by the interposition of this Court.

**Yates vs. Lansing,** 9 Johnson's Reports, 435: Senator CLINTON: "Our constitution renders a judge "liable to impeachment for male and corrupt conduct in "office. * * * *The male and corrupt conduct cannot "beascribed to any error of the understanding, or to any "misconduct, however gross or oppressive, or however "injurious to individuals, unless it is attended by bad "and corrupt motives.* The *malus animus* is difficult, "at all times, to establish, and there is no cause, be it

" ever so desperate, no conduct, be it ever so aban-
" doned, but it may find not only advocates, but advo-
" cates who can advance plausible arguments, and who
" can gild over high-handed acts of oppression, with de-
" clamatory appeals in favor of *judicial independence and*
" *official dignity*. It will, therefore, be a rare instance
" to bring proof sufficiently clear against a judge, in
" order to produce his removal. **Impeachment is**
" **not only difficult to institute and hard to**
" **establish, but, when effected, WHAT**
" **GOOD DOES IT DO TO THE INJURED**
" **PARTY ?**

And because they have already (on February 29, 1892) presented to this Court their petition for a *certiorari*, based upon the proceedings of said Circuit Court of Appeals on its decision of libellants' *first* appeal (49 F. R., 583), involving refusals by said Court of Appeals to follow the decisions of this Court (and this Court is referred to said petition and the brief, filed February 29, 1892 in support thereof, for the particulars thereof), and because, before such application, George A. Black, the proctor for your petitioners (as such libellants), personally applied to Judge WILLIAM J. WALLACE and Judge E. HENRY LACOMBE for a rehearing of such appeal, and was told by each of them separately **" that, while the weight of the " authorities was with the libellants, yet " that they had determined that the said " case must end,"** and that they (who were the only Judges who had heard said appeal) each separately refused such reargument.

Petitioners set forth, for the information of this Court, the following history of the litigation arising out of the loss of the schooner "John K. Shaw":

**1884, February 23d.** The schooner "John K. Shaw" sunk by collision, *and all on board drowned;* the masts seen sticking out of water off Long Branch, N. J., at daybreak of February 24th.

**April 24th.** Alfrederick H. Hatch *et al.*, owners of the "Shaw," libeled steamship "Newport."

**April 25th.** "Newport," claimed by New York and Cuba Mail S. S. Co., and bond for libellants' claim filed; issue was joined by the answer of the Steamship Co., in which they admitted an *alleged harmless collision* with a schooner, but denied it was the "Shaw."

**1886, September 17th.** Libel dismissed by District Court (see 28 F. R., 658).

**1888, October 15th.** Libel dismissed by Circuit Court (see 36 F. R., 910).

**1889, December 28th.** Rehearing, with same result (see 36 F. R., 912).

**1890, November 3d.** Motion for rehearing on newly-discovered evidence (being the proofs taken in the suit of petitioners against Sundberg) denied (see 44 F. R., 300).

**1890, February 5th.** Geo. Bailey *et al.* (owners of the "Shaw") filed their libel against John P. Sundberg, master of the SS. "Newport" to which libel the Virginia Home Ins. Co. was made a party libellant, as insurers and owners of cargo.

**June 16th.** Answer filed setting up plea of *res adjudicata*.

**June 26th.** Plea sustained by District Judge.
See 43 F. R., 81.

**December 22d.** Libel amended under 51st Ad-Rule, avoiding plea of *res adjudicata*.

**1891, January 14th.** New matter of libel in avoidance, overruled by District Judge on respondent's exception, and libel dismissed.
See 44 F. R., 808.

**1892, January 18th.** Libel dismissed by Circuit Court of Appeals as to Bailey *et al.*, owners of the "Shaw," and decree of District Court reversed as to Va. Home Ins. Co., owner of cargo, and libel reinstated.
See 49 F. R., 583.

**February 29th.** First application to Supreme Court for a *certiorari* (denied March 7th, 1892).

**May 23d.** Second application to Circuit Court of Appeals for a reargument (citing Marshall vs. Holmes, 141 U. S., then just reported, that volume having been published in March or April, 1892,) which was denied July 6, 1892 .

**July 20th.** Motion by libellants at the time of filing mandate in Circuit Court, for leave to amend their libel to bring case within decision of Marshall vs. Holmes.

**July 25th.** Motion granted (fols. 25 to 30).

**August 4th.** Amended libel filed (fols. 34 to 68).

**See Amendment at fol. 62.**

**December 1st.** Opinion of Circuit Court of Appeals **refusing to follow Marshall vs. Holmes** (fol. 107).

**December 10th.** Order of Circuit Court striking amended libel of August 4, 1892, from the files.

**1893, November 13th.** Order of Circuit Court of Appeals affirming order of December 10th striking libel from files (no opinion).

Petitioners further allege that on the trial of Hatch vs. the Newport in the U. S. District Court, BROWN, J., found that there must have been *four vessels in collision* at the same time and nearly in the same place (28 F. R., 660) only two of which were ever heard of, viz., the "**Shaw**" and the "**Newport**."

That, on May 27, 1888, when their appeal to the Circuit Court was heard, Judge LACOMBE had very recently been appointed Circuit Judge, and had come to that position from the office of Corporation Counsel of the City of New York, and he told the counsel engaged in arguing the said appeal that "*this was his first experience in Admiralty*," or words to that effect. That having had no *Civil* law or *Admiralty* law training, the said Circuit Judge was evidently unwilling to reverse a Judge of the length of service of Judge BROWN, although Judge LACOMBE was compelled to find that Judge BROWN had come to wrong conclusions in many partic-

ulars (see 36 F. R., 911), and he wholly refused to apply the doctrine of the **civil law** *as to the effect of the non-production of witnesses in Admiralty* (see **The Zodiac,** 9 Ben, 177, **The Rabboni,** 53 F. R. 957), although the claimant of the "Newport" failed to produce the *second officer* (who was on the bridge when the collision occurred, and in charge) and the quartermaster (who was at the wheel when the collision occurred) and very many of the crew (especially the pantryman, who saw the "Shaw" sink after the collision) and many of the passengers who saw the "Shaw" sink and heard cries from her to stand-by, the depositions of which witnesses have been taken since *(after they were discovered by petitioners)* in the suit against said Sundberg, and such depositions prove conclusively that said Sundberg perjured himself on the trial of Hatch vs. The Newport and secured the decision adverse to petitioners by such perjury. That on the trial before Judge LACOMBE he refused to give effect to the *logs of said steamship, introduced by the claimants of said vessel* (see 36 F. R., 912), and on the reargument refused to believe the testimony of the first officer of said steamship, *who was the claimant's witness on the trial* (see 36 F. R., 913), although said first officer was corroborated by the pilot of said steamship *(also the claimant's witness)*, whose corroboration was *ignored* by said Circuit Judge. He also found it necessary to increase the speed of said steamer to **above** fourteen knots an hour (see 36 F. R., 913), *in doing which he* **unlawfully** *rejected and ignored the admission of the answer of the "Newport" that her speed was between thirteen and fourteen knots,* and found it necessary also to decrease the distance off shore of the "Newport" (see 36 F. R., 913), because it was demonstrated to him that his previous finding was *mathematically impossible.*

That the said Circuit Court of Appeals decided petitioners' first appeal (49 F. R., 58) on the authotity of

Emory vs. Fowler, 39 Maine, 326, a case "*sui generis*" **and not applicable to the facts of the petitioners' case,** for the reasons pointed out by petitioners in their brief on their first application to this Court for a *certiorari* at pages 10, 73 and 78, to which petitioners again refer.

**III. That the conduct of the Judges of said Circuit Court of Appeals towards petitioners' counsel, and in cases in which he has appeared before them, demonstrate that they do not intend to give him a fair hearing or decide such cases fairly.**

Petitioners' counsel has appeared before said Circuit Court of Appeals as proctor and advocate in the following causes *since* the argument of the first appeal in Bailey vs. Sundberg, *with the uniform result that they have all been decided against the party he represented.*

**The Doris Eckhoff,** 50 F. R., 134.
**The Venezuela,** 55 F. R., 417.
**The Lurline,** 55 F. R., 422.

In the first cause named the District Judge had sustained the libel of the owners of the schooner "C. R. Flint" against the bark "Doris Eckhoff" (32 F. R., 555), but held both vessels in fault—the "Flint" for not hailing her towboat to haul her into the middle of the East River, and the "Eckhoff" for improper navigation in respect to her own lookout and helm—*and had seen many of the witnesses of the "Eckhoff" and disbelieved them.* Judges WALLACE and LACOMBE heard the appeal, and Judge LACOMBE wrote the opinion for reversal, and refused to follow the *principle* of following the District Judge (applicable to said case, 50 F. R., 138), where the testimony was conflicting and the District Judge had seen the witnesses, laid down by

him in the prior cases decided by him (also against said counsel) of **Morse vs. L. & W. Coal Co.**, 36 F. R., 832, and the **Ludwig Holberg**, 43 F. R., 117, in the latter of which cases he said: "**SOME** of " the witnesses who testified on this branch of the case " were examined by the District Judge. His decision, " therefore, is affirmed."

And, although said counsel presented a petition for a rehearing, citing said former decisions, it was refused.

In the **Venezuela**, petitioners' counsel **took further proofs on appeal under Admiralty Rule 50 of this Court, which preserves the absolute right to do so**, and, upon the motion of the opposing counsel, the said Circuit Court of Appeals, Judge WALLACE writing the opinion (see 52 F. R., 875), suppressed the deposition of one witness, Dallas, who had been called and examined *by such opposing counsel* on the trial in the District Court, and arbitrarily refused to permit the petitioner's counsel to argue the question of the right of the libellant to take and use the evidence of such witness, saying that that question had been sufficiently argued by other counsel.

(**Note.** The Venezuela will be further referred to again.)

The **Lurline** came before said Circuit Court of Appeals on the appeal of the claimant, the petitioner's counsel having succeeded in the District Court, where the District Judge stopped the direct examination of the libellant, stating to his counsel that he had made out a *prima facie* case (see 55 F. R., 423), and as the claimant contended in his brief that no evidence of the *value* of libellant's work had been given in the District Court (where the real contest

had been over an alleged breach of a contract by libellant to put in limber chains), the petitioner's counsel took the deposition of libellant on said appeal, under said 50th Admiralty Rule, and thereupon the claimant's counsel moved to suppress it, and such motion was granted (see 57 F. R., 398) ; and on that motion petitioner's counsel, *knowing from his treatment in the Venezuela case* that the Court would refuse to hear him orally argue the question, submitted a printed brief, *which brief demonstrated the right to take and use such evidence on an Admiralty appeal*, and which brief is annexed to the petition of John P. Hawkins (the libellant against said yacht " Lurline ") to this Court for a mandamus, and is printed in full in the 13 Supreme Court Reporter (p. 512). After the granting of the motion to suppress, said Hawkins applied to this Court for the said mandamus to compel said Circuit Judges to receive and consider said testimony so suppressed, and in support of said motion presented a further brief which is also printed in full in the 13 Supreme Court Reporter (p. 576), **and therewith also presented a brief subscribed by twenty-four of the leading admiralty lawyers of the Southern District of New York,** as *amici curiæ*, which brief is printed in full in said 13 Supreme Court Reporter, page 518, and nearly completely in the 147 U. S., page 487. That, although this Court refused said mandamus for the reasons assigned, **it did not do so because the position as to said depositions argued before it in said briefs was not established.**

The **Lurline** was thereafter tried on appeal before said Circuit Court of Appeals, and decided against the client of petitioner's counsel (55 F. R., 424), and on said trial the said Court again refused to receive the said depositions, *so wrongfully* suppressed by it.

The **Venezuela** was tried before Judges WALLACE, SHIPMAN and LACOMBE *after* the application for a mandamus by Hawkins above recited had been made and denied, and with all the irritation growing out of that application still active, *and resulted in a decision which ignores the first principles of the trial of all issues; namely,* **that a fact admitted by the pleadings is conclusively proved** (see 55 F. R., 418, and correspondence with Hon. NATHANIEL SHIPMAN printed herewith as Exhibits A, B and C, and the *unique* affidavit, Exhibit D).

*The seriousness of the charges above presented rest in their truth,* and not in the statement of them.

**IV. The atmosphere in which the Circuit Court of Appeals sits is unwholesome.**

While the statute creating that Court carefully excludes a Judge from "*sitting*" in review of his own decisions, yet his presence is felt by all counsel who have to comment on his judgments, and must be much more felt by the Judges who are in daily association and consultation with him, and such an atmosphere is most unfavorable to the fair and unbiased administration of justice. If such Judge does not proffer arguments (which counsel have no opportunity for answering), he may be asked questions which lead to discussions and interchange of views (also in the absence of counsel) which, it is most reasonable to suppose, must have some bearing on the result, and such a course is clearly opposed to the spirit of the statute.

**V. The doubt entertained by the Circuit Court of Appeals as to the meaning to be given to the decision of this Court in Marshall vs. Holmes is sufficient ground for a certiorari, or at least for an expression by this Court IN WORDS WHICH ARE NOT**

**OPEN TO DOUBT, of the true state of the law as to avoiding a judgment recovered by perjured evidence.**

Judge **Story** in *Ex parte* **Davenport**, 6 Peters, 661, where this Court denied an application for a mandamus to the District Judge for the Southern District of New York, who had struck out a plea upon an *erroneous* interpretation of an Act of Congress, said: "We "have thought it right to express this opinion on the "present occasion because it appears that there has "been a diversity of judgment among the District "Judges upon the subject."

**"It is probable that the District Judge of "the Southern District of New York will, "upon this intimation, grant the proper "relief."**

**LASTLY**. The **trust** reposed in this Court by the act is manifestly intended to preserve a proper respect for the law in the Judges of the various Circuit Courts of Appeal, and to remove that idea of arbitrary and unlimited power to which men are too frequently liable if they suppose their conduct is free from supervision and restraint.

Senator CLINTON in **Yates vs. Lansing,** 9 John., 437, said: "The principle of responsibility pervades "every department of a free government; for, wher- "ever responsibility ends, tyranny begins. That a "Judge may fine and imprison and punish *ad libitum*, "and, whether he acts according to law or not, he can- "not be reached by suit or indictment, is, in fact, say- "ing that he may act the tyrant at pleasure. **No "man in the community is safe** * * * "**unless they are effectually checked and "controlled BY THIS HIGH TRIBU- "NAL."**

Wherefore, petitioners pray that this Honorable Court will, by its writ of *certiorari*, or in such other manner as to it seems meet, require said cause of

George Bailey *et al.* vs. John P. Sundberg to be certified to the Supreme Court, and otherwise right and justice do.

And your petitioners will ever pray, &c.

December 29th, 1893.

GEORGE BAILEY and others, by GEO. A. BLACK,
Of Counsel for Petitioners,
44 Pine Street,
New York City.

---

I hereby certify that I am familiar with all the matter stated in the foregoing petition, and that the same are true, and that, in my opinion, the above application is meritorious and the case a proper one for the relief prayed for.

Dated December 29th, 1893.

GEO. A. BLACK,
Of Counsel for Petitioners.

## A.

GEORGE A. BLACK,
Counsellor at Law and Proctor in Admiralty,
No. 44 Pine Street.
Tel. 435 Cortland.

Lawrence Kneeland.

NEW YORK, June 21st, 1893.

HON. NATHANIEL SHIPMAN:

DEAR SIR—The case of the "Venezuela" is settled, the money paid and decrees satisfied, and all judicial interest in the case (except as an authority) closed. Such being the case, I feel that I, as the counsel who represented one side, may with propriety address you, and ask a correction of your reported opinion while there is yet time for it.

In 55 F. R., at page 419, in the preliminary report (which, I am informed, is still subject to correction), you say that I contended that, inasmuch as the "Venezuela's" answer admitted "by silence," etc.

An examination of the libel (folio 10) and answer (folio 33) will show that you have fallen into error, and that, in fact, the admission was express. "The allegations of the fifth article of the libel are true," says the answer, and adds "except" certain matters, not one of which refers to the location of the anchor or its coming home.

While you have doubtless not overlooked the decisions, cited on my brief, of Young vs. Grundy, 6 Cranch., 51, and the Dodge Healy, 4 Wash. C. C., 656, in suggesting *(id. idem)* that "the Merrit Co. could with equal propriety have insisted upon the same technicality, for the allegations of its seventh article were not *in substance* denied by the "Venezuela," you certainly have not stated or given the impression that the difference be-

tween the two answers of the "Venezuela" in this respect, was that the answer to Merritt's libel omitted to refer to the seventh article of that libel at all, while the third article of the "Venezuela's" answer to the Insurance Co. is that "the allegations of the fifth article are true" (fol. 33).

Such errors of statement bear upon me professionally, and although I have not lost the confidence of my clients, I am by the published opinion made to appear as advocating a doctrine I never presented and never should have thought of presenting—which when read by my *brothers-in-law* will materially prejudice me in their estimation.

Am I not entitled to be set right?

Very respectfully yours,

GEO. A. BLACK,

---

**B.**

UNITED STATES CIRCUIT COURT,

JUDGE'S CHAMBERS.

HARTFORD, July 13th, 1893.

GEO. A. BLACK, ESQ.:

DEAR SIR—Upon my return from Chicago I found your letter of June 21. Since my return I have been much occupied and therefore prevented from making an earlier reply.

Your criticism of my opinion seems to be a repetition, in another form, of the statement made in the affidavit which you made after the decision was rendered, a method of practice, which seemed to me, at the time, unique. The position in the affidavit was that I had misstated the answer, Your letter is to the effect that I misrepresented your position upon the argument.

Your letter enables me to say that the opinion recited the allegations of the 5th Article, including the allegation that an anchor had been laid by the "Buckley" nearly six points on the starboard bow of the "Venezuela," and further stated that the answer of the claimants admitted the allegations of the 5th Article with sundry exceptions, those which are important being specified, and added: "It did not deny that an anchor had been laid nearly six points on the starboard bow." The opinion thus expressly stated that the allegation in regard to the anchor had been affirmatively admitted, and also pointed out that it was not included in the exceptions.

The opinion also recited the allegations of the 7th Article of the Merritt libel and the fact that no express reference was made in the answer to the 7th Article, and further stated the admission which was made in the answer to the detailed statement in the 4th Article.

In view of the full recitals in regard to the 5th Article and the answer thereto, I do not perceive the importance of the criticism upon the too broad statement of your claim. No one who reads the opinion will be in any ignorance of the state of the pleadings, neither will your legal reputation suffer in the estimation of your associates. I was not, and do not think that others will be so much impressed as you were with the solemnity of this part of your case.

Had you promptly called my attention to this alleged misrepresentation, I should probably have corrected it with pleasure, but the opinion has been printed in some of the journals. Your affidavit is a part of the files, and was based upon the opinion as originally written, and it seems to me too late to make the alteration which you desire.

I entertain no heresies upon the abstract principle of equity pleading in regard to admissions by not answering.

There are, however, answers and answers, and the

question always is in such cases, is the abstract principle applicable to the particular state of facts?

For example, compare Judge CLIFFORD's two opinions in the 7th Wallace, Agawam Co. v. Jordan, p. 609, and Brown v. Pierce, p. 211.

Yours, etc.,

(sg.) N. SHIPMAN.

---

## C.

NEW YORK, July 17th, 1893.

HON. NATHANIEL SHIPMAN:

DEAR SIR—Your favor of July 13th, in answer to my letter of June 21st, is received. I appreciate the consideration you have given to it, and note (with regret) that you do not think I acted promptly enough in calling your attention to the misrepresentation, although the affidavit you refer to in which I set forth your misstatement of the answer, was presented to the Court on April 24th, within six days after your opinion was promulgated, and the "unique" application was made on notice, as required by the rules of the court, as I did not suppose I had any right to apply *ex parte*. I do not now think it merited the epithet of a "re-hash" applied to it by the presiding justice.

Allow me to suggest to you that when you stated in your opinion that the V's answer "*did not deny* that an anchor had been laid nearly six points on the starboard bow," which you quote in your letter and interpret thus:

"The opinion *thus expressly* stated that the allega-
"tion in regard to the anchor had been *affirmatively*
"admitted"—you put a construction on "not

denying" which is unusual, but is in accord with the expression in your opinion quoted in my letter "admits by silence," etc., and when you further say that the Merritt Co. "could, with *equal* propriety, have insisted upon the same *technicality*" (*i. e.*, an admission "by silence") as to the seventh article of their libel, "because," as you say, "the answer of the claimants made *no reference* to the seventh article," it seems to me you have fallen into the error I pointed out, and, if not advocating the "heresies" you speak of, yet you propound them as principles which I advocated, and say "which the Merritt Co. could, with *equal* propriety, have insisted on."

The "*equal* propriety" necessarily refers to an insistance by me of the doctrine I repudiate, and against which I cited the two cases of Young vs. Grundy, 6 Cranch., 51, and the Dodge Healy, 4 Wash. C. C., 656, both decisive against it, and I am represented as arguing for—what I argued against.

You now tell me that my legal reputation will not suffer while I am left, crystalized in your opinion, as advocating a doctrine which you now characterize as a "heresy" in the law. I do not find in either of Judge CLIFFORD'S opinions, which you refer to, anything to change the views I advocated. In Brown vs. Pierce, 7 Wall., 211, he asserted the same doctrine I contended for, and also cited and followed Young vs. Grundy, 6 Cranch., 51; and in Agawam Co. vs. Jordan *(id.*, 609*)*, he said that while the answer was unsatisfactory he also said, as you will see by turning the page, that it was a "clear *implication* from the answer that it admitted," etc., which is a clear case of interpretation, and not of failure to answer.

I did not expect you could change your opinion except as published in the F. R., but I believe I am entitled to a note from you which could be printed as a foot note or otherwise to show that my position was misunderstood by the Court, or at least by you. I do not dwell on the "solemnity of this part of my case,"

but suggest for your consideration that you were a lawyer before you became a judge, and ask you to be as tender of my legal reputation as you would have wished judges to be of yours, when you were practising at the bar.

Very respectfully yours,

GEO. A. BLACK.

---

## D.

## The Unique Affidavit.

IN THE CIRCUIT COURT OF APPEALS.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.,
Appellants,

AGAINST

SS. "VENEZUELA," BOULTON, BLISS & DALLETT, Claimants,
Appellees.

CITY AND COUNTY OF NEW YORK, SS. :

GEORGE A. BLACK, being duly sworn, says that he has examined with care the opinion of the Court herein, and that it appears to him that the said Court has erred in its interpretation of the pleadings herein. In the opinion the Court says :

" The Insurance Company and the Gulf Wrecking " Company insist that, inasmuch as the answer of the " ' Venezuela ' to their libel admits, **by silence**, the truth

" of those allegations of the 5th article which are not " denied, the District Judge was absolutely bound by " the pleadings as to the facts so admitted."

That the allegations, *in question*, of the fifth article of the libel and the allegations of the third article of the answer are as follows:

| Libel (fol. 10). | Answer (fol. 33). |
|---|---|
| That prior to this time an anchor had been laid by the tug "Buckley" nearly six points on the starboard side of the "Venezuela," and efforts made by hauling on that anchor to haul the vessel off, which had no effect—the anchor coming home. | Third. That the *allegations* of the fifth article *are true* **except** the allegations therein that the sea caused the steamer "Venezuela" to roll, the allegation that the steamer "Venezuela" was heading east-southeast, the allegation that efforts had been made to haul the steamer "Venezuela" off with the anchor, and the allegation that the steamship "North America," pulled the "Venezuela" off said shoals; but it is admitted that she assisted in getting said vessel off the shoals. |

Deponent further says that it seems to him that, if the above article of the answer had stopped with the statement "that the allegations of the fifth article are true," it could not be said that the admission was "*by silence;*" and how can it be so said as to the matters *not excepted*, all of which are admitted to be true?

And deponent says that in view of this state of the pleadings, and of the evidence given by Mr. Bliss, one of the claimants herein, confirming the allegation that the anchor was laid six points on the starboard bow,

and of all the other evidence in this case, the libellants would ask the reconsideration of this Court of that portion of the opinion which charges the libellants with costs of their appeal.

GEO. A. BLACK.

Sworn to before me this 20th day of April. 1893.

LAWRENCE KNEELAND,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

[SEAL.]

# U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

GEORGE BAILEY ET AL.,
Libellants and Appellants,

vs.

JOHN P. SUNDBURG,
Respondent and Appellee.

## BRIEF FOR LIBELLANTS.

### Statement.

This appeal is from a final decree disallowing libellants' amendment to their libel, and vacating an order that the garnishees transfer the garnished securities to the Clerk of the Court and dismissing the libel (fols. 117 to 120).

### Assignment of Errors.

The Circuit Court erred in vacating its order of July 25 (fol. 26), and in vacating the order of October 13 (fol. 86) requiring the garnishees to give bond, &c.

## Points.

This case comes before this Court for a second time under very peculiar circumstances. The mandate required the Circuit Court to dismiss the libel as to all libellants except the Virginia Home Insurance Company. This mandate was based upon the opinion of this Court reported in 49 F. R., 583. On the hearing of that appeal, the Court *refused to hear argument* as to the avoidance by libellants of the plea of *res adjudicata*, on the allegation that it was secured by the *perjured* evidence of the respondent, and by his complicity in the suppression of evidence (Libel, 55-62), and its opinion (49 F. R., 583) did not discuss the question as to the conclusiveness of the judgment as affected by those facts, admitted by the respondents exception to exist.

After that decision and, before the filing of the mandate, libellants moved (May 19th, 1892) this Court for a reargument, and in support of said motion (on which no oral argument was permitted) cited the case of Marshall vs. Holmes, 141 U. S., 589.

It *now* appears, by the opinion of LACOMBE, J. (107), that that motion was denied *because* the members of the Court of Appeals "were not *satisfied* that the Supreme "Court *intended*, in Marshall vs. Holmes, to repudiate "or modify the *well-settled doctrine* expounded in "United States vs. Throckmorton, that the conclusive-"ness of the judgment was not to be questioned when "pleaded in another suit, *solely* because it had been pro-"cured by perjured testimony." This opinion of Judge LACOMBE'S was promulgated December 1st, 1892 (fol. 7), long after the motion for reargument had been denied and the mandate filed, and, of course, libellants' counsel was ignorant of the position this Court had taken in reference to that decision, and *never had an opportunity* to present any views on the subject or to apply to the Court of Appeals for a certificate, as suggested by Judge LACOMBE (fol. 109).

Libellants, at the time of filing the mandate, and

**before any decree** thereon (July 20th, 1892, fol. 4), presented an affidavit (20) to the Circuit Court and moved for leave to amend their third amended libel; *i. e.*, the one considered by this Court on the appeal. The Circuit Court granted the motion (26).

## Amendments in Admiralty.

Admiralty Rule 24 of the Supreme Court provides:

"In all informations and libels in causes of *admiralty* " and maritime jurisdiction, amendments in matters of " form may be made at any time, on motion to the " Court, as of course. *And new counts may be filed,* " *and amendments in matters of substance may be* " *made, upon motion, at any time before the* **final** " *decree.*" * * *

The Charles Morgan, 115 U. S., 75.
The Montana, 129 U. S., 446.

In the "**Morgan,**" the Court laid down the general proposition as to amendments as follows (76):

"If proper care is taken to avoid *surprise* and to " confine amendments in the appellate court to the " original *subject* of controversy, so as not to allow " matters outside of the *general scope* of the pleadings " below to be brought in, *it is difficult to see how any* " *possible harm can come from permitting a libellant to* " *amend his libel in such a way as to give him the full* " *benefit of his suit as it has been begun.*"

In the **Montana,** the Supreme Court had before it for review the propriety of the refusal by the Circuit Court (sitting as an Appellate Admiralty Court) to allow an amendment of the answer in *that* Court *after the trial and filing of its findings of fact and conclusions of law, but before the entry of a final decree in favor of the libellants*, and said (447):

"We are not prepared to say that, if upon full con- " sideration, **justice should appear to require** " **it,** we might not do so" (*i. e.*, overrule the decision of the Circuit Court), "and order the case to be re- " manded to that Court *with directions to allow the*

" *answer to be amended* and proof of the foreign law to " be introduced " (citing the " Adeline," 9 Cranch., 284; the " Marianña Flora," 11 Wheat., 38; the " Charles Morgan," 115 U. S., 69; the " Gazelle," 128 U. S., 474), and the Court then proceeded to consider the question of the effect of the proof offered as if admitted.

The **Adeline** (9 Cranch., 284, 1815) was a prize proceeding in behalf of American *recaptors*, in which it was insisted that the property libeled was not enemy's property, and that the libellants were, therefore, only entitled to *salvage*, which it was argued could not be awarded in a suit claiming the property as *prize* of war. STORY, J., in pronouncing the judgment of the Court, observed that " the most that could " result " (from the allowance of the objection against the form of the libel) " would be that the cause would " be *remanded* to the Circuit Court with *direction to allow* " *an amendment of the libel.*" *Where merits clearly ap-* " *pear on the record, it* **it is the settled practice** " **in admiralty** *proceedings not to dismiss the libel*, but to allow the party to assert his rights in a new alle- " gation. This practice so consonant with equity and " sound principle has been *deliberately* adopted by this " Court on former occasions. * * * But we are all " of opinion that there is nothing in this objection. " **No proceedings can be more unlike than** " **those in the courts of common law and** " **in the admiralty.**"

**The Marianna Flora**—11 Wheaton, 38. STORY, J. " An objection, which is preliminary in its " nature, has been taken to the admissibility of this new " count to the libel, filed in the Circuit Court, upon the " ground that the original subject-matter was exclusively " cognizable in the District Court; and to allow this " amendment would be to institute an original, and not " an appellate inquiry in the Circuit Court. *But the ob-* " *jection itself is founded on a mistaken view of the rights* " *and authorities of Appellate Courts* **of Admiralty.** " *It is the common usage, and admitted doctrine of* **such** " *Courts*, to permit the parties, upon the appeal, to in-

**The Sarah,** 8 Wheaton, 391—MARSHALL, C. J.:

"By the act constituting the judicial system of the "United States, the District Courts are Courts both of "common law and *admiralty*. In the trial of all cases "of seizure *on land*, the Court sits as a Court of com- "mon law. In cases of seizure *on waters* navigable by "vessels of ten tons burden and upwards, the Court "sits as a Court of *Admiralty*."

"In all cases at common law, the trial must be by "jury. In cases of *admiralty* and maritime jurisdiction, "it has been *settled*, in the case of 'The Vengeance,' "reported in 3 Dallas Rep., 297, 'The Sally,' in 2 "Cranch's Rep., 406, and 'The Betsy and Charlotte,' "in 4 Cranch's Rep., 443, that the trial is to be by the "Court."

**"Although the two jurisdictions are "vested in the same tribunal, they are as "different from each other as if they were "vested in different tribunals, and can no "more be blended than a Court of Chan- "cery with a Court of common law."**

"The Court for the Louisiana district was sitting as "a Court of *Admiralty*, and when it was shown that "the seizure was made on land its jurisdiction ceased. "The libel ought to have been dismissed, **or "amended, by charging that the seizure "was made on land."** * * *

"As the libel charges a seizure on water it is thought "most advisable to reverse all the proceedings to the "libel, and *to remand the cause to the District Court for "further proceedings* **with directions to permit "the libel to be amended."**

**NOTE.** It will be observed that the amendment permitted, ousted the jurisdiction of the Admiralty court, and threw the case into the common-law court.

" troduce **new allegations** and new proofs, *non* " *allegata allegare, et non probata probare.* The Courts " of the United States, in the exercise of appellate " jurisdiction *in admiralty* causes, are, by law, author- " ized to proceed according to the course of proceed- " ings in *Admiralty Courts.* It has been the constant " habit of the Circuit Courts to allow amendments of " this nature, in cases where public justice and the " substantial merits required them; and this practice " has not only been incidentally sanctioned in this " Court, but on various occasions, *in the exercise of its* " *own final appellate jurisdiction, it has remanded* " *causes to the Circuit Court, with directions to allow* " *new counts to be filed.*"

In the case of the **Caroline and Emily,** February Term, 1813, 1 Wh., 13, note *g*, the libel was *in rem* under the Slave Trade Act, and in the opinion of the Court showed no breach of the law, *although the evidence did*, and the following decree was entered; " It is " the opinion of Court that the libel is too imperfectly " drawn to found a sentence of condemnation thereon. " The sentence of the Court is therefore reversed and " the cause remanded to the Circuit Court, with direc- " tions *to admit the libel to be amended.*"

In the **Edward,** 1 Wheat., 264 (1816), WASHINGTON, J., says:

" It is contended for the claimant that the Circuit " Court has only appellate jurisdiction in cases of this " nature, and that to allow the introduction of new alle- " gations would be, in fact, to originate the cause in the " Circuit Court. This question appears to be fully de- " cided by the case of the 'Caroline and Emily,' de- " termined in this Court."

In the brig **Caroline vs. U. S.,** 7 Cranch, 500, the case was remanded with directions to permit the amendments, and the same course was pursued in the **Schooner Anne vs. U. S.,** *Id.*, 570."

In the **Gazelle,** 128 U. S., 487, the Court say:

" In the courts of **admiralty** of the United States, " although the proofs of each party must substantially " correspond to his allegations, *so far as to prevent sur-*

" *prise*, yet there are no technical rules of variance, or " of departure in pleading, *as at common law ;* and if a " libellant propounds with distinctness the substantive " facts upon which he relies, and prays, either spe- " cially or generally, for appropriate relief (even if there " is inaccuracy in his statement of subordinate facts, or " of the legal effect of the facts propounded), the Court " may award any relief which the law applicable to the " case warrants."

**Garland vs. Davis,** 4 How., 152:

Even at *common law* the justice of allowing a "repleader" is recognized; and Lord MANSFIELD is quoted from Rex vs. Philips, 1 Burr., 302, as follows:

" The reasoning of Lord MANSFIELD on this whole " subject is directly in point as well as the case itself, " and contains that *beautiful correction* by him of a " much abused maxim, in which he says **it is the " duty of a good Judge to amplify JUS- " TICE rather than his jurisdiction ;** *boni " judicis est ampliare justiciam*, not *jurisdictionem.*"

" There, after a *verdict for plaintiff*, he allowed an " amendment of the *plea* on payment of costs, being " satisfied that 'the ends of justice require that an " ' opportunity for forming a proper issue be allowed.'

Broom's Legal Maxims, p. *59.

## The Law to Be Applied in This Case.

The first inquiry naturally occurring to the jurist is, what law must be applied to the case submitted for his consideration.

This idea received full consideration by the Supreme Court in **The J. E. Rumbell,** 148 U. S., 17, GRAY, J.: "But the question in controversy, arises in " the courts of the United States **exercising the " admiralty and maritime jurisdiction ex- " clusively vested in them by the Constitu- " tion."** * * *

(P. 19:) " It would seem to follow that any priority " *given by the statute of a State or by decisions at com-*

" *mon law or in equity is immaterial* and that the **ad-**
" **miralty** courts of the United States enforcing the
" lien because it is *maritime* in its nature, arising upon
" a maritime contract, **must give it the rank to**
" **which it is entitled by the principles of**
" **the maritime and admiralty law.**"

## WHAT IS THE ADMIRALTY LAW?

**The Lottawanna,** 21 Wall., 574:

BRADLEY, J.: " That we have a *maritime* law of our
" own operative throughout the United States cannot
" be doubted. *The general system of maritime law*
" which was familiar to the lawyers and statesmen of
" the country when the constitution was adopted was
" most certainly *intended and referred to* when it was
" declared in that instrument that the judicial power of
" the United States shall extend 'to all cases of Ad-
" 'miralty and maritime jurisdiction.'

" But by what criterion are we to ascertain the pre-
" cise limits of the law thus adopted?

" The Constitution does not define it. * * * It
" treats this matter as it does the cognate ones of
" common law and equity, when it speaks of 'cases in
" 'law or equity,' or of 'suits at common law' with-
" out defining those terms, assuming them to be
" known and understood."

**St. Lawrence,** 1 Bl., 526.

TANEY, J. (1861): "The Court could not, consist-
" ently with its duty, refuse to exercise a power which
" the Constitution and law had clothed it when its aid
" was invoked by a party who was *entitled to demand*
" it as a matter of right."

" But there is a wide difference between the *power*
" *of the Court upon a question of jurisdiction* and its
" authority over its *modes of procedure and process.*"

**Benedict's Ad.,** § 5. "The Admiralty law is in-
" debted, for many of its characteristics, to the circum-

" stances of the countries in which it was first ad-
" ministered.

" The countries that earliest reduced the *law of the*
" *sea* to a system and adopted codes of maritime
" regulations, having been countries in which the
" Roman or **civil** law prevailed, *the principles of that*
" *great system of jurisprudence were incorporated with,*
" and gave character to, the maritime law, and so
" much were *pure* reason, *abstract* right and *practical*
" justice mingled in that system, and so important was
" it that the general maritime laws should be uniform
" and universal, that, in England, where the common
" law was the law of the land, the **civil law**
" was held to be **the law of the admiralty,**
" and the course of proceedings in admiralty closely
" resembled the civil law practice.

**1 Kent Coms.,** p. *369: " This large and liberal
" construction of the *admiralty* powers of the District
" Court and their extension to all maritime contracts,
" was recommended by the general equity and sim-
" plicity of admiralty proceedings, and the policy and
" wisdom of that code of maritime law *which had em-*
" *bodied the enlightened reason of the* **civil** *law,* and
" the customs and usages of the maritime nations."

**Id.,** p. *545: " The **civil** law had followed the
" progress of the Roman power into ancient Britain."
" * * * **Id.,** p *546: " The ecclesiastical courts and
" the Court of Chancery accordingly adopted the canon
" and Roman law, *and the Court of Admiralty,* which was
" constituted about the time of Edward I., also supplied
" the defects of the laws of Oleron from the **civil** law."

**Id.,** p. *547: " The **whole** body of the **civil** law
" will excite never-failing curiosity *and receive the hom-*
" *age of scholars as a singular monument of wisdom.*"

**Betts, Ad.,** page VII.: " But whatever may be
" the fact in regard to common law courts, there is no
" controversy but that **the Courts of the Admi-**
" **ralty had its proceedings in conformity**
" **to the CIVIL law** from its earliest institution
" * * * page VIII. The colonial vice-admiralties

" on their establishment in America, would be induced " from many considerations to recur to the *civil* law for " their course of procedure in preference to adopting " that of the ecclesiastical courts. * * *

" *Practitioners, educated with a view to the business* " *of the maritime courts, made the* **civil** law the subject " of closest study * * * page X.: ' The archives " ' of the admiralty in this district (*i. e.*, New York) for " ' more than seventy years and up to the Revolution, " ' exhibit a striking similitude between its methods of " ' procedure *and those of the civil law.*'

" In whichever way, then, the authority is derived, " either mediately through the English admiralty and " canonical courts, *or directly from the* **civil** *code*, **that** " **law** *in reality supplies the elements and all the essen-* " *tial details of the American admiralty practice.*"

**Id.**, page 11: " The pleadings and practice of the " Court being derived essentially from the **civil** law, it " is important that **proctors** should study the princi- " ples of that code applicable to these topics." * * *

**Id.**, page 12: " No practitioner, however expert and " learned in *common law* proceedings, can properly " rely upon that skill alone in managing the business " of *admiralty* courts."

**Flanders Maritime Law**, p. 4, § 8: " The " Rhodian laws were the source of the maritime juris- " prudence of the Romans. * * * These celebrated " laws have not been handed down to us. All that " survives of them is found in the digest and arranged " under one title—De Lege Rhodia de Jactu.

" This, together with the few, brief rules of the " Roman law, embraced in the works of Justinian, is " all that remains to us of the commercial law of the " Ancients. *But fragmentary as it is, it constitutes* " *nevertheless the basis of the* **marine law** *of the Mod-* " *erns* in several of its most important and positive " rules. What survives is comprehensive, liberal and " just and teaches the value of what was lost."

**Parsons Shipping and Admiralty**, Vol. I., pp. 5 to 17; p. 16: " What is the **admiralty** jurisdic-

"tion secured to the Courts of the United States by "the Constitution ?

"Many, and probably a great majority, of the lawyers "of this country have no other idea of it than that "which the *shattered* and *fettered* admiralty of Eng- "land could give them."

**The Northumbria,** L. R., 3 Ad. and Ec., 9, Sir ROBERT PHILIMORE: "But it appears to me quite a "sufficient answer to these authorities" (*i. e.*, common law cases) "to say that the **Admiralty,** in the "exercise of an equitable jurisdiction, has proceeded "upon another and a different principle from that on "which the *common law* authorities appear to be "founded.

**"The principle adopted by the Admir- "alty has been that of the CIVIL LAW."**

**Atkins vs. Disintegrating Co.,** 18 Wall, 307 (followed *in re* Louisville Underwriters, 134 U. S., 492). SWAYNE, J., page 304: "While the *mode of proceed- "ing* in the Admiralty Courts of the United States was "required by the Practice Act of 1789 to be according "to the course of the *civil* law, the process of attach- "ment, to compel the appearance of an absent defend- "ant had the sanction of that system of jurisprudence.

"It has the sanction of the Act of 1792, because it is "according to the *principles, rules and usages which "belong to Courts of Admiralty.*"

**The Yankee Blade,** 19 How., 89. GRIER, J.: "The maritime privilege or lien is adopted from the "*Civil* law, and imports a tacit hypothecation of the "subject of it."

**U. S. vs. Gibert,** 2 Sum., 70. STORY, J.: "Until the statute of 28 Henry 8, Ch. 13, piracies on the high seas were exclusively triable in the Admiralty *according to the course of the* **Civil** *law.*"

**De Lovio vs. Boit,** 2 Gallison. STORY, J. p. 406: "From its earliest traces the Admiralty of England is found exercising a very extensive mari-

time authority *governed by the* **rules** *and forms of proceeding of the* **Civil law."**

It will thus be seen that the **Civil law** is the source of both jurisdiction and procedure in Admiralty.

**Eulogium of Admiralty Law,** by Geo. Ticknor Curtis, in his preface to his Admiralty Digest: "It "has been remarked with truth, by very high author- "ity, that no man ever studied the Admiralty Jurisdic- "tion without being a lover of it; and, certainly, no "branch of jurisprudence with which I am acquainted "possesses, in an equal degree, qualities that may be "called fascinating. *The antiquity of its origin;* the "growth of its doctrines, expanding with the exigences "and growth of commerce and maritime adventure; "the constant aim of its tendencies towards equity and "principle, and the very important and interesting ob- "jects that fall under its cognizance, render it attract- "ive, when the harsher features and more rigorous "rules of other systems have wearied and repelled the "student." * * * "The Admiralty should be "otherwise known than as a court of curious learning, "where controversies are determined upon principles "and under forms which, to the popular feeling, are "unusual, abstruse or difficult of apprehension. "Its process and forms are indeed in many respects "different from those of the Common Law, the admin- "istration of which is most generally familiar to the "people of the United States. But one of its main "and most characteristic features is, that it is, to the "extent of its jurisdiction, a Court of Equity. It en- "tertains pleas of part performance, and decrees an "instrument to be good in part and bad in part, as the "fact and equity of the case may be. It annuls positive "contracts improvidently entered into by its 'ward,' "the seaman, and is not restrained from his protection "by the binding sanctity of a seal.* *It rejects alto-*

*See Delovo vs. Boit, 2 Gall., 457.

" *gether in its pleadings the technical niceties of the Com-*
" *mon Law, and requires only that the substantial merits*
" *should be set forth, in forms that are peculiar, indeed,*
" *but wholly liberal and unembarrassing.* In the con-
" struction of contracts, it seeks to combine the inten-
" tion of the parties and actual justice, in the result of
" their controversies."

**Perjured evidence DECEIVES and MISLEADS the Court, and is ground for avoiding any judgment obtained by it.**

The earliest reported case is that of Susannah vs. the Elders, reported in the Vulgate—Daniel, Ch. 13.

S. C., Apochrapha.

**Causes Celebres** (Tome VIII., p. 480): " Telle " fut la vertu héroique de Suzanne qui étant accusés " par ces vieillards impudiques qui deposerent contre " elle, fut délivré par **Daniel,** jeune homme, qu' il ne " faut pas confondre avec le prophete de ce nom. Dieu " le suscita pour faire triompher l'innocence de Suz- " anne; **il obligea ceux qui l'avoient con- " damnee de la juger de nouveau."**

**Daniel,** Cap. XIII., v. 48: " Sic fatui filii Israel, " non judicantes, neque quod verum est cognoscentes " condemnastis filiam Israel."

**V. 49: " Revertimini ad judicium quia " falsum testimonium locuti sunt adversus " eam."**

Biblia Sacra Vulgatae Editionis.
Venetiis, 1688.
Nicholaum Pezzana.

**Daniel,** c. XIII., v. 48, 49: " Insensés fils d'Israel, " leur dit il, qui ne savez pas discerner la vérité; vous " avez condamné l'innocence.

" Jugez-la de nouveau, parceque de faux témoignages " se sont élevés contre elle."

## THE CIVIL CODE. Lib. VII., Titulus LVIII.

### Si ex falsis instrumentis VEL TESTIMONIIS judicatum sit.

I. Impp. Severus et Antoninus A. A. Bassianum.

Si tabulas testamenti, quas secutus proconsul vir clarissimus sententiam dixit, falsas dicere vis ; praebebit notionem suam, non obstante prae-scriptione rei judicatae quia nondum de falso quaesitum est.

II. Imp. Alexander A. Optato.

Et qui non provocaverunt, si instrumentis falsis se victos esse probare possunt ; cum de crimine docuerint ex integro de causa audiuntur.

Proposit 16 calend octobris Juliano 11 et Crispino Coss.

III. Idem A. Clement.

Falsam quidem testationem, qua diversa pars in judicio adversus te usa est (ut proponis) solito more arguere non prohiberis.

Sed causa judicati in irritum non devocatur, nisi probare poteris eum, qui judicaverat secutum ejus instrumentum fidem, quod falsum esse constiterit adversus te pronunciasse.

Proposit 7 calend septembris.

IV. Imp. Gordianus A. Herennio.

Judicati executio solet suspendi et soluti dari repetitio, si falsis instrumentis circumventam esse religionem judicantis (crimine postea falsi illato) manifestis probationibus fuerit ostensum.

Propos 5 id. septemb.

Corpus Juris Civilis, Tom II., p. 446.
Geo. Aug. Spargenberg.
Gottingae.
Corpus Juris Civilis, Tom II., p. 348.
Donysii Gothfredi.
Antverpiae, MDCCXXVI.

Les Douze Livres du Code de l'empereur Justinien, traduit en Français par P. A. Tissot, Metz, 1807 (Vol. 12, p. 127).

Code, Livre VII., Titre LVIII.

De ce qui a été jugé d'après de fausses pièces et de faux témoignages.

1. *Les empereurs Sèvère et Antonin à Bassianus :*

Si vous voulez arguer de faux un testament d'après lequel le noble pro-consul a prononcé une sentence, il entendra vos réclamations, nonobstant la chose jugée, parce que la question de faux n'a pas été décidée.

2. L'empereur Alexandre á Optatus :

Ceux mêmes qui n'ont pas appelé de la sentence rendue contre eux sur de fausses pièces, doivent être entendus s'ils peuvent prouver le faux, parce qu'ici, s'agissant d'un crime, la cause doit être recommencée en entier.

Fait le 16 des cal. d'Oct., sous le second cons. de Julien et le premier de Crispinus.

3. Le même empereur à Clément :

Vous n'êtes point empêché d'arguer de faux la pièce dont votre adversaire, d'après ce que vous observez, a usé contre vous en justice. Mais la chose jugée ne sera révoquée qu'en tant que vous pourrez prouver que le juge a basé la sentence qu'il a prononcée contre vous sur la pièce que vous prétendez être fausse.

Fait le 7 des calends de Septembre.

4. L'empereur Gordien à Herennius :

On suspend ordinairement l'exécution de la chose jugée, et l'on donne la répétition de ce qui aurait déjà pu être jugé, lorsqu'il est prouvé par la suite et par les preuves évidentes, que la religion du juge a été trompée par de fausses pièces.

Fait le 5 des ides de Septembre.

Book 7, Title 58 :

**If judgment has been obtained by false documents or TESTIMONY :**

I. The Emperors Severus and Antonius to Bassianus :

If you wish to show that the pages of the will, relying upon which the illustrious preconsul has given judgment, are forgeries, he will make his own investigation, the objection of a former decision not standing in the way, *because there has not yet been an inquiry about the forgery.*

II. The Emperor Alexander to Optatus :

And those who have not appealed, if they can show that they were defeated by false evidence, because a crime is involved, can have the cause heard entirely anew.

III. Same to Clement :

You will not, indeed, be prevented by the common usage from showing (as you propose) that the testimony which the opposite party used against you in court is perjured.

But a decision is not declared a nullity unless you can show that he who had decided to pronounce judgment against you relied upon the faith of that evidence which has been proved to have been perjured.

IV. The Emperor Gordianus to Herennius :

The execution of a judgment is usually stayed, and a recovery of the amount paid granted, the allegation of perjury having been advanced, if it has been shown by clear proofs that the conscience of the Court has been imposed upon by the perjured evidence.

Such being the **civil law,** and an **Admiralty** Court being obliged to apply and enforce it, the right of libellant to allege that the perjury of the respondent *misled and deceived the Court,* and to try *that issue,* in avoidance of the plea of *res adjudicata,* is manifest.

**The peculiar feature of the case at bar** is that the libellants have not asked to amend their libel as to any of the substantive facts of their case, but the District Court having, upon the exceptions filed by the

libellant to the plea of *res adjudicata* of respondent, decided that such plea was good (BROWN, J., 43 F. R., 81), libellants, under Admiralty Rule 51 of the Supreme Court, amended their libel December 20, 1890 (18), setting up matter *in confession and avoidance of such plea.*

Marshall vs. Holmes was not argued until April, 1891.

After Marshall vs. Holmes was reported, libellants moved the Circuit Court for leave to amend their libel on the allegation that such new matter was true (fol. 23), and was omitted *in ignorance* of the decision in Marshall vs. Holmes. *It is a hard doctrine* to assert that libellants should not be allowed such amendment, *if by it the* **justice** *of their case can be established.*

## Judge Lacombe's Reasons Why the Libel Should Not Be Amended.

(1) That Marshall vs. Holmes did not repudiate or modify, U. S. vs. Throckmorton (107).

(2) That, if respondent told a deliberate falsehood, such action did not *prevent* libellant from fully exhibiting his case (108).

(3) That the point raised *could be properly made on the pleadings as they stood* (110, 113), and had been already passed upon—upon its merits (110).

(4) That it would be **unfair** *after his point had been heard and decided adversely by the Court of Appeals* (113) to allow the amendment.

(5) That the principles of Marshall vs. Holmes are **no new doctrine, but "well-settled law,"** therefore libellant ought to have followed it (113). *(Compare this with No. 1.)*

The point raised by the amendment was not presented by the pleadings as they stood, and the amendment (62) is clearly necessary, but **if** *the point made by*

*the* **amendment** *was presented by the libel (16), and* **if** *it was considered and decided adversely by the Court of Appeals* it would be fair to allow the amendment on the ground stated by Judge LACOMBE: "*conceiving it* "*was but just that the final record should contain sufficient averments to enable the Supreme Court,* **should** "**libellant eventually succeed in getting** "**there,** *to pass upon the point considered by the Court* "*of Appeals, but, as I thought, not fully disclosed on* "*the record*" (107).

**An examination of the record shows that the matter of the amendment** (62–65) **NOWHERE appeared in the libel** (44 to 62).

## A Review of U. S. vs. Throckmorton, 98 U. S., 61.

LACOMBE, J. (107): "The Court of Appeals denied "the motion, because its members *were not satisfied* "that the Supreme Court *intended* by the language "they used in Marshall vs. Holmes, 141 U. S., 589 (the "forged document case), to **repudiate** or modify the "*well-settled doctrine* expounded in U. S. vs. Throck- "morton, 98 U. S., 61, that the conclusiveness of a "judgment was not to be questioned, when pleaded in "another suit, *solely* because it had been procured by "perjured testimony."

An examination of U. S. vs. Throckmorton shows that that case was considered in *three* different and distinct aspects, either of which may have been the one on which the majority of that Court founded its judgment (71), and, taking them up in the inverse order (the last expression of the Court being deemed the most convincing to its mind), it appears:

(**1**) That one reason for that affirmance was (71) "*the Circuit Court has no jurisdiction* to interfere with "or relieve against a survey, which by the allegation "of the bill itself *is pending* before the District "Court."

(**2**) (p. 70). "There is **another** objection to the "bill which, though not going to the merits, is, in our "opinion, *equally fatal* to it in its present shape.

"We are of opinion that, unless by virtue of an Act "of Congress, no one but the Attorney-General, or "some one authorized to use his name, can bring a "suit to set aside a patent issued by the United States, "or a judgment rendered in its courts on which "such a patent is founded. *That is the case before us,* "and we see nothing in the bill to indicate to the Court "that it ever received the sanction of the Attorney-"General, or was brought by his direction."

(**3**) Judge MILLER (62) goes into an examination of the bill, which alleges that the grant upon which the judgment was obtained was falsely and fraudulently ante-dated, and that to support this simulated and false document, the parties procured and filed depositions of *perjured* witnesses.

He says (62) that there is "*no allegation* what-"ever that any of the attorneys, agents, or other "officers of the Government were false in their "duty to it, or *that they assisted or connived at the* "*fraud*, unless a single allegation on that subject, "which will be hereafter considered, sufficiently makes "such charge. For the present it will be assumed "that no such charge is made."

The single allegation above referred to is considered by Judge MILLER at page 69, and is to the effect that Howard, one of the defendants, then the law agent of the Government, had notice, from the papers in some other suit, of the fraudulent character of the grant, and that he neglected to inform the Commissioners of the fact; and the Judge adds (69): "**If there had been** "**a further allegation** that Howard was then *inter-*"*ested* in the Richardson claim, or that Richardson had "*bribed* him, or that, **from any corrupt motive,** "he had betrayed the interest of the Government, *the* "*case would have come within the rule which authorizes* "*relief.* But nothing of the kind is alleged."

**Nota Bene.** In Bailey vs. Sundberg the allegation is that the respondent was the master of the "Newport." The law makes him, as master, *personally* liable to the libellants, and the *existence of a corrupt motive and of an interest* in *defeating the recovery of the libellants* are sufficiently manifest. Besides which, *it is alleged* (fol. 59) that the *failure and omission* to call and examine witnesses who would have proved the perjury of the respondent, *which witnesses were known to him* (56), was by the advice and **procurement** of the respondent (59). This was a distinct allegation of a *corrupt* and efficient motive and act.

Judge MILLER goes into *an extended* examination of the cases cited by him, but it is a *noticeable fact* that he entirely omits any reference to the doctrine which in Marshall vs. Holmes (141 U. S., 596) Judge HARLAN says is *the settled doctrine*, namely, "that any fact "which proves it to be against conscience to execute a "judgment, and of which the injured party could not "have availed himself in a court of law, or of which he "might have availed himself at law, but was prevented "by fraud or accident, unmixed with any fault or neg-"ligence in himself or his agents, will justify an appli-"cation to the Court of Chancery." It is even more noticeable that he does not cite a single one of the cases which are cited by Judge HARLAN in support of that doctrine, of which four, namely :

Marine Ins. Co. vs. Hogson, 7 Cranch., 332, 336.
Hendrickson vs. Hinckley, 17 How., 443, 445.
Crim vs. Handley, 94 U. S., 652, 653.
Floyd vs. Jayne, 6 Johns. Ch., 482.

were all reported prior to Judge MILLER's opinion.

It is noticeable also that Judge MILLER sets forth in detail the "*extraordinary*" features of the bill before him, and *gives great weight to its peculiar facts*; for instance, at page 64, he speaks of the scrutiny which was necessarily given to the paper, the necessity of it to support the claim, obvious to all persons interested (63), and the length of time which it was under consideration, *more than four years* after the fraudulent grant

was filed (63), and that the bill was not filed for "*more "than twenty years* after the rendition of the decree "which it seeks to annul" (64), and he says (64): "But "we think *these* are good reasons why a bill which "seeks under *these* circumstances to annul a decree "thus surrounded by every presumption which should "give it support, *shall present on its face* a clear and "unquestionable ground on which the jurisdiction it "invokes can rest."

At page 70 he says: "One great, if not *fatal*, defect "in the bill is the absence of any declaration of the "means by which the fraud has been discovered *or can* "*be now established.*"

No such criticism can be made of the libel in this case (fols. 56 to 59).

## Marshall vs. Holmes Considered.

It is respectfully submitted that **a doubt** of what the case of Marshall vs. Holmes decided ought not to deprive the libellants of the benefit of what is declared in that case to be the "*settled doctrine*," supported, as it is, by the decisions and authorities therein cited. It is the latest annunciation by that court of the doctrine contended for, and in view of the above review of the Throckmorton case, which, while it is cited by Judge HARLAN (596) is not noticed as in any way opposed to the doctrine, and if it is in conflict with "the settled doctrine" he refers to, it is strange that Judge HARLAN did not find it out when he so carefully criticised and distinguished the case he was considering from the case of Norgue vs. Clapp, 101 U. S., 551, and Graham vs. B. H. & E. R. R., 118 U. S., 177, calling attention (600) that in Norgue's case "*it did not appear*, **nor was it "alleged,** *that the facts constituting the fraud were "not, before the rendition of the decree, within the knowl-"edge of the party seeking its annullment, or could not "have been discovered in time to bring them in some ap-"propriate mode to the attention of the Court, while the "decree was within its control*," and calling attention to the defect of that case (600), viz., "that *equity* will not

" interfere with a judgment at law, even where the " party has an equitable defence, if he could, by the " exercise of diligence, have availed himself of that de- " fence in the action at law to which he was a party." Judge HARLAN also states (600) that Graham vs. Boston, &c. Railroad does not differ in principle from Norgue vs. Clapp.

When the Supreme Court came to the conclusion it did in the Marshall case that the judgment of the Louisiana Supreme Court *should be* **reversed** (which Court had dismissed the appeal of the plaintiff from the judgment of the lower Court, which had dissolved the plaintiff's injunction, and thereby **authorized** the enforcement of the *fraudulent* judgment), and determined that the plaintiff was entitled to a trial in the United States Circuit Court of the **cause of action alleged,** and said (601): " It might be relief could be " granted by reason of the fact, *distinctly alleged,* that " **some** of the necessary proof establishing the " forgery of the letter was discovered after the judg- " ments at law were rendered, and after the legal de- " lays within which new trials could have been obtained, " and could not have been discovered by her sooner;" **it must have decided** that such allegations *prima facie* gave *a cause of action*, to be tried in the Circuit Court, for it says that the Circuit Court could, upon *final hearing,* " determine whether, *under the allegations* and " proofs a *case* was made which, according to the estab- " lished principles of equity, *entitled* Mrs. Marshall to " protection against the judgments alleged to have been " fraudulently obtained."

**In Barrow vs. Hunton,** 99 U. S., 83, Mr. Justice BRADLEY recognized the distinction between the continuation of the original action and a suit brought to set aside a recovery on the ground of fraud, in these words:

" On the other hand, if the proceedings are tantamount " to *a plea in equity* to set aside a decree **for fraud** " **in the obtaining thereof,** then they constitute " an original and independent proceeding, and, accord- " ing to the doctrine laid down in Gaines vs. Fuentes

" (92 U. S., 10), the case might be within the cognizance " of the Federal Courts. The *distinction* between the " two classes of cases " (the other class which he is referring to is that of a *continuous* proceeding) " may be " somewhat nice, but it may be affirmed to exist. In " the one case there would be a mere *revision* of errors " and irregularities, or of the legality and correctness " of the judgments and decrees of the State Courts; " and, in the other class, *the investigation of a new case* " arising upon *new* facts, although having relation to " the validity of an actual judgment or decree, or of " the party's right to claim any benefit by reason " thereof."

The same distinction was recognized in **Vidala vs. Lawes,** L. R., 25 Q. B. D., 310 (1890, C. of A.), where the Court says: "The technical objection that the " issue is the same is technically answered by the tech- " nical reply that the issue is not the same, be- " cause in this Court you have to consider *whether the* " *foreign Court has been* **imposed** *upon.*"

## The Doctrine of Marshall vs. Holmes is no New Law.

Judge HARLAN says (596): "*It is the settled doctrine,*" and quotes from C. J. Marshall in Marine Ins. Co. vs. Hodgson, 7 Cranch, 336.

The principle quoted in Marshall vs. Holmes, 141 U. S., 596, " *It is well settled law,*" &c., was expressed in the following language by Kent, Chan., in **Foster vs. Wood,** 6 John, Ch. 89 (1822): "The rule is that " Chancery will not relieve against a judgment *at law,* " on the ground of its being contrary to equity, *unless* " the defendant in the judgment *was ignorant of the* " *fact in question* pending the suit, or it could not have " been received as a defense, or unless he was prevented " from availing himself of the defense by fraud or acci- " dent or the act of the opposite party, *unmixed with* " *negligence or fault on his part.*"

**Stillwell vs. Carpenter,** 59 N. Y., 423 (1875).

ANDREWS, J.: " But it is an ancient and *established* " jurisdiction of courts of equity to restrain proceed-

**Trefz vs. Knickerbocker Life Insurance Co.,** 8 F. R., 177 (1881):

NIXON, D. J., sitting in the Circuit Court, had before him *a bill in equity*, filed by the insurance company, to set aside a judgment recovered in the same Court some four years before (1877), founded on two policies of insurance on the life of the deceased husband of the plaintiff at law. The defense at law was that the insurance company had granted the policies on the faith of certain statements of the insured, among which was the assertion of the assured that he was sober, etc. The bill set out that the insurance company had resisted the payment on the ground that the insured was an habitual drunkard when he procured the policies, and continued to be a drunkard afterwards, and that said habits brought about his death. That the complainant, in preparing for the trial *at law*, had made *ineffectual* efforts to find proof of the habits of intoxication of the assured, but learned that he had been afflicted with a sunstroke which he had concealed, and on the trial the insurance company was obliged to abandon its defense of the use of liquor, and were unsuccessful in their defense as to the concealment of the sunstroke. The *bill* then stated that in 1880 the complainants obtained competent proof that the assured had been an habitual drunkard, and upon this proof had applied to the Court for a new trial, which had been denied. It also stated that the widow (the plaintiff in the action at law) was a witness on the trial (179), " and in her testimony studiously **concealed** the fact " that he had been suffering with *delirium tremens* and " spitting of blood, and that his death was caused by " his habits of intoxication, **and gave an account " of his sickness entirely inconsistent with " her own knowledge of his condition"** *(i. e.,* committed **perjury**), " and that she congratulated " herself upon the successful concealment of these " facts."

The bill prayed for an injunction from allowing any execution to be issued on the judgments and for further relief. A *demurrer* was filed to this bill (181), and the Court said:

"Whilst the demurrer of the defendant does not "admit the truth of the mere *pro forma* charge of "fraud in obtaining the judgment at law made in the "complainant's bill, it does admit the truth of every "fact stated which goes to establish the fraud, and if "the foregoing statements must be accepted as true, "*they are quite sufficient to justify the Court in enjoin-*"*ing all further proceedings upon the judgment*, until at "least some further investigation into their truth can "take place."

Demurrer overruled.

" ings upon judgments at law, obtained by fraud and " contrary to justice. * * * He then cites the " language of MARSHALL, Ch. J. :

In **Ross vs. Wood,** 70 N. Y., 10 (1877).

ALLEN, J., quotes from KENT, J., in Foster vs. Wood, 6 J. C. R., 87, as above, and adds: " The fraud which " will justify equitable interference in setting aside " judgments and decrees must be actual and positive " and not merely constructive. It must be that which " occurs in the very concoction or *procuring* of the " judgment or decree and *something not known to the* " *opposite party at the time and for not knowing which* " *he is not chargeable with negligence* (Patch vs. Ward, " L. R., 3 Ch. Ap., p. 203; Story, Eq. J., § 1581, *et* " *seq.*; Dobson vs. Pierce, 2 Kern., 12 N. Y., 156; " Michigan vs. Phenix Bank, 33 N. Y., 9; Fonb, Eq., " 27, 642, notes).

" Relief can only be granted upon some *new* matter " of equity *not arising in the former case.*" * * *

The Court, having stated general principles, points out the defects of the complaint before it, and says:

" It is **not averred** in the complaint * * * " that he was *prevented* or *hindered* in any way or by " any means from *fully* and *fairly* litigating the action " and *giving all the evidence* which could then have " been or *can now be given,* or that *he did not have the* " *benefit of all the evidence then or now existing.* *

" *It is not alleged that any evidence material to the* " *contention has been discovered since the former trial,* " *or that the testimony can be materially changed upon* " *a retrial.*

" * * * (p. 12.) There was *no suppression of evi-* " *dence* by the plaintiff in the former action or *igno-* " *rance* on the part of the present plaintiff of any fact " material to the controversy; and *all the evidence* " *which is now within his reach was produced or might* " *have been produced on that trial,* and was equally " competent then as now."

---

* It is so alleged in the libel (8th Art., fol. 63, 56).

All the above *omissions* exist in the third amended libel, and the amendment supplies them (fol. 62).

## A Very Similar Case,

**Verplanck vs. Van Buren**, 76 N. Y., 247, was an action brought by a Receiver to recover damages for a conspiracy to manufacture false and ficticious accounts, and *thereby deceive the Court*, which they did.

FOLGER, J., states the question involved at page 254: "Did not the making *and proof* by the defend- "ant in the former action of the *unreal contracts* and "*false* books and sales to the *deceiving* of the plaintiff "therein *and the Court* which tried it and gave judg- "ment, have the effect in law of giving to the plaintiff in "this action *a right to go behind the judgment*, and open "the accounting then made and now recover what was "left out of it *on the ground that that judgment* was got "by the defendants *by a fraud upon the plaintiff therein* "*and upon the Court*" (p. 257). "The defendants say "to that in effect, there has been an action and issue "thereupon, a trial *and an adjudication between us*— "and we have paid all that was adjudicated against "us, and that is final. And the principle behind them "is that where the parties in the former suit were the "same or are privies in blood, estate or law; and where "the matters coming in question are the same, then "the former judgment is, as a plea, a bar, and, as evi- "dence, conclusive. *As we have shown, the parties to* "*the two actions are the same, or are privies in estate* "*or law, and the matters in question* are the same.

**"But the plaintiff says if that be con- "ceded, yet the former judgment was "obtained by the fraud of the defendants, "and is, therefore, void.**

"The principle behind him is that fraud and imposi- "tion invalidate a judgment, as they do all acts."

The Court then (p. 258) considered Patch vs. Ward, L. R., 3 Ch. Ap., 203, and the *common-law* remedies for conspiracy, and says (p. 259), "In such action the evi-

" dence of a technical conspiracy is not essential. The " damage is the cause of action, and the conspiracy " mere matter of aggravation, and such action lies " where the combination is for the purpose of fraudu- " lently making use of legal proceedings, and where " the damage is effected by such use. * * * (p. " 260.) The fraudulent concealment might be effectual " to carry on at the outset the fraudulent purpose, as " well as a positive false statement, and if so, is ac- " tionable. *But there was affirmative statement when* " *the spurious contracts and falsely kept books were* " *brought into court and maintained by the testimony of* " *the defendants.*"

The judgment dismissing the complaint was reversed *the entire Court concurring* (p. 262).

Incidentally the Court says (p. 259): " The plaintiff " here does not sue for an accounting between the par- " ties to the agreement. If he had done so, *and the* " *former adjudication had been pleaded,* he might, " without reply (so far as the rules of pleading are " concerned), **have made proof of the fraud** " and transformed the action into an equitable one in " its nature, and have asked for a judgment setting it " aside and taking a new accounting and awarding pay- " ment of the amount found due thereon."

In **Heiser vs. Mayor, &c.,** 104 N. Y., 73, RUGER, J., repeats the language of Judge MARSHALL, criticises the complaint as not coming up to the requirements.

The English Court of Appeals recognizes the same right—and distinguishes between the *errors* of the Court and the *deception* of the parties, and while it is permitted to show that the Court has been *misled* it is not permitted to show it has been *mistaken.*

**Abouloff vs. Oppenheimer,** L. R., 10 Q. B. D., 301.

**Vidala vs. Lawes,** L. R., 25 Q. B. D., 310.

**Shall it be said that the Courts of the United States, at this date in the era of civilization, refuse to give relief for frauds perpetrated ON IT, while those perpetrated on parties MISLEADING THEM, are ground therefor?**

It appears by this review of the authorities that the amendment asked for is essential to the case libellants make, and that without it their libel does not contain allegations entitling them to the relief they seek.

If libellants *(as they allege*, 63) did not know, and could not with due care ascertain, "the witnesses who could prove the said false evidence of the respondent," by which the Hatch decree was obtained, and were free *(as they allege*, 62) from negligence, laches or other fault, it is difficult to see why "justice does not require" that they should have the opportunity to show it.

## Respondent's Motion.

The Circuit Court acted without any formal motion papers before it on the respondent's motion to *rehear* the motion to amend the third amended libel.

The motion made (93) was to resettle the *garnishee* order (86), and the reargument of the libellants' motion to amend was *impromptu*, and followed by the respondents' brief (97), which asserts that the amendment was "almost *identical* with the former libel" (101), and contends that the "*sole additional allegation* in the last "amended libel is that the libellants were not guilty of "negligence, laches or other fault in procuring *evi*-"*dence*."

Respondent's counsel thus recognized that there was an *additional* allegation—one *not* appearing on the pleadings as they stood, and shown to be essential.

The respondent's counsel attempts to dispose of this additional allegation by asserting that it had been passed on by the Circuit Court of Appeals in a sentence quoted (104) from its opinion, which sentence dealt with the respondent's defense of laches, as applicable to the suit of the *cargo owner*, and had no bearing on the question of *avoiding* the defense of *res adjudicata* by the schooner's owners showing *how the Court had been misled and imposed upon.*

No other ground of objection was presented by respondent's brief (97), and the Circuit Judge has seen fit to *add* those specified by him. That suggested by

the Circuit Judge (113) that as the doctrine of Marshall vs. Holmes was *well settled law*, libellant's counsel ought to have made his libel conform to it is inconsistent with the other statement by the same Judge (107) that Marshall vs. Holmes did not repudiate or modify the well-settled doctrine of U. S. vs. Throckmorton. If the learned Court so interpreted U. S. vs. Throckmorton libellants' counsel who drew the original libel *before* Marshall vs. Holmes was even argued—can hardly be blamed (and his clients still less) for not giving to U. S. vs. Throckmorton a more restricted meaning than the *learned* Judge did.

Another reason for allowing the amendments exists in the fact that in respondent's plea of *res adjudicata* he nowhere alleges that he was a party to the Hatch suit, nor that he *openly* appeared therein, nor that libellants *knew* that he was defending that suit.

Schroeder vs. Lahrman, 26 Minn., 89.
Central Baptist Church vs. Manchester S. C. of R. I., 23 Atlantic R., 30.

**Lastly.** The test to apply to the amendment is that furnished in the Montana 129 U. S., 446—viz.: "*Does justice appear to require it?*"

"*Justice*," *in the sense of the Admiralty Law—i. e.*, that if a right of action or defense *exists*, and is imperfectly stated, then **justice** does require that the *party* shall have a full opportunity, *without regard to technicalities*, to present their claim or defense. The 24th Admiralty rule of the Supreme Court, which "has the *force of* an Act of Congress" on this Court (Bailey vs. Sundberg, 49 F. R., 585) requires that the amendment should be allowed, when applied for, as it was, "before final decree." The libel before this Court on the first appeal was overruled *on exceptions to its sufficiency*, and, by parity with Admiralty Rule 28, libellants *should have been required* to amend before dismissing their libel. That rule *requires* the Court to order that the *respondent* amend his answer when it is held bad on exceptions, and inasmuch as by Admiralty Rule 51

there can be no *replication* in admiralty, and the matter in avoidance of respondent's plea of *res adjudicata* had to be plead as an amendment to the original libel, that *form of procedure* should not prejudice libellants.

Should this Court refuse to follow the views and arguments here presented, and for the reason expressed in Judge LACOMBE'S opinion—"*because its members are* "**not satisfied** *that the Supreme Court intended by* "*the language they used in Marshall vs. Holmes, 141* "*U. S., 589 (the forged document case) to repudiate or* "*modify the well-settled doctrine expounded in U. S.* "*vs. Throckmorton, 98 U. S., 61, that the conclusive-*"*ness of a judgment was not to be questioned when* "*pleaded in another suit solely because it had been pro-*"*cured by perjured testimony*" (fol. 107)—it is earnestly submitted that this Court should *certify the question of what the Supreme Court did intend* to that Court under § 6 of Ch. 517 of 1891, as suggested by Judge LACOMBE (fol. 109).

The libellants' amendment should stand, and the order of October 13, 1892, should be reinstated.

September 28, 1893.

Respectfully submitted,

GEO. A. BLACK,

Advocate for Libellants.

# APPENDIX.

## SOME MORE AUTHORITIES.

**Dexter vs. Arnold,** 5 Mason, 309 (1829), petition for leave to file a bill of review on the ground of new matters of fact.

**Story**, J., cites (310) from the ordinance of Lord BACON :

" Upon new proof that is come to light after the " decree made, and could not possibly have been used " at the time when the decree passed, a bill of review " may be grounded, by the special license of the Court, " and not otherwise."

And at page 312 he proceeds to consider the meaning of this extract, to wit : " That the matter must not " only be new, but that it must be such as that the " party, by the use of reasonable dilligence, could " not have known."

And at page 314 he points out that it is not only a review upon *new matter* that has arisen, but also upon *new proof* that has come to light, and quotes from Lord ELDON :

" If the *fact* had been known before publication, " though some contradiction appears in the cases, there " is no authority that *new evidence* would not be suffi- " cient ground," and further refers to what seems to have been considered a distinction between *documentary* and *oral* evidence subsequently discovered ; and at page 315 quotes Willan vs. Willan, 16 Vezey, 88, as

supposing "that *new testimony of witnesses* may be admissible," on which he passed no opinion.

**Wood vs. Man,** 2 Sumn., 324 (1836): Bill in equity to set aside a conveyance; case already twice before the Court on interlocutory motions and set down for hearing, and now an application to take a new deposition, on the ground that it was material testimony which had been very recently discovered by the plaintiff, the new evidence consisting of the alleged confessions of the defendant to the witness. Publication had passed nearly a year ago, and the question was on the admissibility of this evidence; and, at page 324, Judge **Story** says:

"The question, then, is reduced to this, whether *new* "*evidence by witnesses*, which has been discovered since "publication has passed and the contents of the depo- "sitions been made known, can, consistently with the "general objects and purposes of the rule, be allowed? "Now, this is partly a matter of authority, and partly "of principle. And I fully agree that if, upon a re- "hearing, or upon a bill of review, *the evidence of new* "*witnesses* ought to be let in, then it ought now to be "allowed, to avoid circuity of remedy and increased "expenses of litigation." And, after reviewing many cases, Judge STORY says, at page 330:

"Finding no direct English authority, either way, "upon the point of exclusion of *oral* evidence, I have "sought for information in cases of an analogous na- "ture, such as bills of review, and supplementary bills "in the nature of bills of review; for, I repeat it, if in "such cases the evidence would be admissible, it "ought now to be admitted."

and at page 332, after reviewing the cases, he says:

"The language of Lord ELDEN in Milner vs. Lord "Harwood (17 Vez. R., 148) already cited, appears to "me to confirm the conclusion, that upon rehearings "and bills of review, upon newly discovered evidence, "*parol* evidence to facts is not necessarily prohibited "by any general pratice or rule of law."

He then refers to the review of the subject already

made by him in Dexter vs. Arnold (5 Mason R., 303, 314), and sums up his conclusions in these words (334):

"The result has already been incidently suggested. "But I will give it in a more direct and positive form. "It is, that there is no universal and absolute rule "which prohibits the Court from allowing the intro- "duction of *newly discovered evidence of witnesses* to "facts in issue in the cause, after publication and "knowledge of the former testimony, *and even after the* "*hearing.*"

**Ocean Ins. Co. vs. Field,** 2 Story 59 (1841)—Bill in equity to set aside a judgment obtained on a policy of insurance in the U. S. Circuit Court, upon the ground of newly discovered evidence. The bill set forth that in the month of February, 1838, the plaintiff was sued by the defendant, issue was joined, and trial had before a jury. That on that trial, the complainant being ignorant of certain fraudulent intents and practices, and being unable to prove them, a verdict was rendered in favor of Fields, which the plaintiff was compelled to pay. That since such payment the plaintiff had discovered and was informed that the vessel insured had been bored, setting forth the details of the boring, etc. (60, 61). A demurrer was filed to the bill (62) and Judge **Story** said, page 77:

"The office of a demurrer is to bring before the "Court the right to maintain the bill upon the ad- "mission *pro hac vice* of the entire truth of all its "allegations, and the Court cannot look *aliunde* to "search out or conjecture what other facts might or "did exist *to defeat* the bill. That is the proper office "of a plea or answer." And to the objection that the evidence now alleged to be newly discovered was cumulative, Judge STORY said, page 78: "But I do "not know that it has ever been decided that in an "assignable case, where the defense has been *imper-* "*fectly* made out at the trial from the *defect* of "real and substantial proofs, although there were "some circumstances of a doubtful character, or some "presumptions of a loose and indeterminable bearing "before the jury, *and afterwards newly discovered evi-*

" *dence has come out, full and direct, and positive, to the* " *very gist of the controversy*, a court of equity will not " interfere to grant relief and to sustain a bill to bring " forth and try the force and validity of the new evi- " dence. My recollection does not furnish me with any " case where a doctrine so strict and so binding has " been positively upheld and pronounced. The dis- " position of courts of equity, upon this head, seems, " as far as I can gather it, not to encourage new litigation " in cases of this sort; but, at the same time, not to assert " their own imcompetency to grant relief, if a very " strong case can be made out. **A FORTIORI " all reasoning upon such a point must be " powerfully increased in strength, when " it is applied to a case which, upon the " face of the bill, IS COMPOSED AND " CONCOCTED OF THE DARKEST IN- " GREDIENTS OF FRAUD, IF NOT OF " CRIME.** At all events, it would be an extraordi- " nary course for a court of equity to pronounce such " a judgment in such a case upon a demurrer, rather " than to retain it for a final adjudication upon a hear- " ing of the merits, where the full pressure of the whole " facts, and the weight of all the attendant circum- " stances known at the trial and *discovered since*, may " be fully brought before it. * * *

" It does not appear to me that it can be laid down " as a positive rule that in no case whatsoever ought " relief to be granted, however stringent the evi- " dence may be which goes to establish the fraud as- " serted, but imperfectly brought out at the trial, *from* " *the mere defect of evidence* without laches of the " party seeking relief in equity. But in the present " case I am not prepared to say that the *very fraud* " now preferred in the bill was identical with that pro- " pounded at the trial. Fraud in casting away a ship " may be very distinguishable from fraud in destroying " her by boring holes in her bottom. Both may con- " cur and be concomitant circumstances of the same " general transaction; but they may also constitute " distinct and independent transactions and matters of

" defense. How can a court of equity, *upon a dry de-*
" *murrer*, assert that they are one rather than the
" other?"

**Stowell vs. Eldred,** 26 Wis. R., 504 (1870). Action on a judgment. Defense that the judgment had been procured by the **perjured** evidence of the plaintiff. The judgment for $11,680.14 had been recovered by plaintiff against the defendants. COLE, J. (507):

" The answer demurred to alleges that said judg-
" ment was fraudulently obtained as to $6,503.84, and
" demands that for this amount the judgment should
" be enjoined. It is not denied that the answer must
" have the same effect given to it as a bill in
" equity under the old practice, to relieve against a
" judgment at law. If, therefore, the matters stated
" in the answer would constitute good grounds for an
" injunction in a bill of equity, they must be sustained
" as a defense here."

" It is claimed by the defendant that the matters
" stated in the answer show that the judgment is un-
" just; *that it was procured by* **perjured** *testimony*
" *given by one of the plaintiffs*, and that it would be
" unconscionable to allow it to be enforced for the full
" amount. * * * To our minds, the answer not
" only shows, with sufficient particularity, that **a**
" **high crime was committed** on the trial by
" one of the plaintiffs *swearing falsely* upon a most
" material fact in the original suit, but it also
" shows that the defendant has not by his *laches*
" forfeited his right to claim the interposi-
" tion of a court of equity to enjoin the judgment.
" *Of course, the allegations of the answer must be as-*
" *sumed to be true on the demurrer.* And this being
" so, we are certainly warranted in saying that the
" plaintiff *Samuel R. Haven*, who was the only one of
" the plaintiffs present at the trial, and who was called
" as a witness by the defendant to prove the agency of
" Scofield in accepting the surrender of the demises
" premises, **was guilty of perjury.** * * *
" (509). The answer further shows that the agent

" Scofield had removed from and left the City of Chi-
" cago, and that his place of residence was unknown to
" the defendant, who, upon diligent inquiry, was
" unable to find or procure such agent as
" a witness on the trial. **And the question now**
" **is: Was the defendant guilty of laches in**
" **going to trial, under the circumstances,**
" **without asking for a continuance of the**
" **cause to enable him to procure the at-**
" **tendance of Scofield, AND RELYING**
" **UPON THE PLAINTIFF HAVEN TELL-**
" **ING THE TRUTH UNDER OATH?** It
" seems to us not. If a party goes to trial relying
" upon the opposite party to prove his case when
" called as his witness, he may have no equitable
" ground for relief upon failing to prove what he
" expected to, so long as such opposite party tes-
" tifies truly to matters within his knowledge.
" **But he has a right to act upon the pre-**
" **sumption that the opposite party, when**
" **sworn, WILL NOT COMMIT PERJURY.**
" We, therefore, do not think that it was negligence
" for the defendant to go to trial relying upon the
" plaintiff Haven testifying truly in regard to the
" agency of Scofield.

The order sustaining the demurer was reversed.

**Stowell vs. Eldred,** 39 Wis., 614 (1876), is the same case on an appeal from the judgment, after a trial onthe merits, in which the former decision was followed, and the plaintiff having established the **perjury** of the party to the former suit by which the judgment had been recovered, obtained the relief he asked for. A curious attempt was made to avoid the contention that Haven's evidence was perjured, which was disposed of by the Court as follows, page 633:

" It is claimed, however, that the case is not within
" that rule, for the alleged reason that Dr. Haven did
" not commit *perjury* in his testimony on the trial of
" the Illinois suit, but that he had forgotten the facts
" and testified honestly, though inaccurately. The
" answer to this position is that Dr. Haven, knowing

" all the facts essential to Eldred's defense in that suit,
" *ought not to have forgotten them, when a little* **honest**
" **effort** *in that direction would have brought them with-*
" *in his recollection.* He and his co-plaintiffs cannot be
" heard in a court of equity to assert such forgetfulness,
" and thereby compel Anson Eldred to pay them many
" thousand dollars more than, in equity and justice, he
" owes them."

Respectfully submitted,

GEO. A. BLACK,
Proctor for Libellants,
44 Pine Street, N. Y.

October 23, 1893.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

# United States Circuit Court of Appeals.

GEORGE BAILEY ET AL.,
Libellants and Appellants,

AGAINST

JOHN P. SUNDBERG,
Respondent and Appellee.

## Supplemental Brief for Libellants in Answer to Motion to Dismiss Appeal.

The respondent's notice of motion to dismiss the appeal herein states that it will be made upon the transcript of record of this Court (Apostles) and the brief of the libellants, but states no grounds for the motion.

The printed brief of the respondents assigns as ground for the motion, that the order of December 10th, 1892 (Apostles, 115), is not a final decree from which an appeal can be taken. In support of this position, no authority is cited, and nothing which can be called an argument is presented.

## POINTS.

### I. What is a final decree?

**Fuller vs. Claflin,** 93 U. S., 14 (1876): Action to recover on two promissory notes. The defense was that the execution of the notes was procured by an

agent of the holder, who represented the balance due by defendant below to be $3,407, for which amount he gave his note.

That the statement was false and fraudulent, and that the amount due was less than $1,550, which amount had been paid to the defendant in error.

Demurrer to the answer overruled.

Motion made and *granted* that the answer be rendered more specific by setting forth the particulars of the alleged falsity.

In obedience to this order a further answer was filed.

Motion *to strike out the further answer* as not a compliance with the order, and for judgment, *granted* and judgment entered, from which the writ of error is taken.

(P. 15:) " It is objected, preliminarily, that the order " directing the answer to be made more specific is one " depending upon the discretion of the Court, and that " it is not appealable. * * * The rule we are " speaking of has sometimes been held to apply to an " order refusing to strike out an answer. **But it " does not apply to an order which strikes " out an answer. That is not a mere pro- " cedure in the cause, it is the ENDING of " the cause, leaving the action undefended " and with a right to immediate judgment.** " * * * Such an order has often been held to be ap- " pealable. * * * We are of opinion that there was " error in the proceeding below; that the order, strik- " ing out the answer and final judgment rendered, " should be reversed, and the case remanded."

**Windsor vs. McVeigh,** 93 U. S., 274.—Writ of error by defendant below to review a judgment for plaintiff in ejectment. The plaintiff proved title in himself, unless his life estate had been divested by a sale *under a decree of condemnation* rendered in March, 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for confiscation. In July, 1863, the premises in controversy were seized by the Marshal, and in August a

libel of information was filed in the name of the United States in the District Court. The District Judge allowed process of monition to be issued and published. On the return of the monition the owner of the property appeared and filed a claim and answer to the libel. On the 10th of March, 1864, the District Attorney moved that the claim and answer and appearance of the respondent **be stricken from the files,** which motion was *granted*, and sentence and decree condemning the property to the United States entered, and a *venditioni exponas* issued; at the sale the grantor of defendant became the purchaser.

FIELD, J. (278):

"It is difficult to speak of a decree thus rendered "with moderation; it was, in fact, a mere arbitrary "edict, clothed in the form of a judicial sentence." * * *

(P. 283:) "It was not within the power of the jurisdic- "tion of the District Court to proceed with the case, so "as to affect the rights of the owner *after his appearance* "*had been stricken out*, and the benefit of the citation "to him thus denied. For jurisdiction is the right to "hear and determine; not to determine without hear- "ing." Judgment for plaintiff in ejectment affirmed.

**II.** It appears by the apostles that on July 25th, 1892 (fol. 30), Judge LACOMBE signed an order allowing the libellants to amend their amended libel (27). It appears that on July 26th (33), the day following this last-mentioned order, Judge LACOMBE signed an order, in conformity with the mandate, directing that the amended libel should be dismissed. *The libel so dismissed was the third amended libel* addressed to Hon. ADDISON BROWN, Judge of the District Court (16). It appears that on August 4th, 1892 (68), the fourth amended libel (amended by the order of Judge LACOMBE, of July 25th) addressed to the Hon. WILLIAM J. WALLACE, Judge of the Circuit Court of the United States was filed (34). It

appears that, on the 13th day of October, 1892 (85), the Circuit Court entered its order, on a motion of *these* libellants, requiring the garnishees to transfer the garnisheed securites to the Clerk of the Court. It appears that, on the 10th of December, 1892 (115), Judge LACOMBE ordered the amended libel filed August 4th **to be stricken from the files,** and the order of the 13th of October, against the garnishees, vacated (117). It appears that, on December 20th, 1893 (119), libellants duly appealed from the last-mentioned order of December 10th, 1892 (see Statement, 5 to 8).

It is apparent, from the above statement, that Bailey vs. Sunberg *was pending in the Circuit Court down to the time of the entry of the order of December 10th, 1892,* and that that order, *which ordered the libel stricken from the files,* and vacated the order allowing the amendment, etc., **for the first time turned libellants out of Court.** Such order was a final order, and gave effect to the decree of July 26th (33), which dismissed the third amended libel, as to the libellants Bailey *et al.*

**III.** This being an admiralty appeal, *which is a new trial,* it must be governed by the rules of admiralty procedure, and by those rules the right or propriety of an amendment to a libel is always matter of examination. If the Circuit Judge had denied the motion to amend the libel, that motion could have been renewed on appeal. That he granted the motion in the first instance, and subsequently for the reasons assigned by him (Apostles, 106, 114) concluded to reconsider and reverse his former action in no degree changes the position of the case or the parties or their rights. *The question for this Court is whether the respondents,* **in justice** (admiralty justice), are entitled to the amendment.

**Resler vs. Shehee,** 1 Cranch, 110 (1801) :

Plaintiff in error, having suffered judgment for want of a plea, at the third term thereafter applied for leave

to plead specially to the action; motion overruled, and after final judgment he brought a writ of error.

THE COURT: "The facts stated in the plea might "have been given in evidence on the general issue. "The Court exercised their **discretion soundly** in "rejecting the plea."

This case shows that *even* on a common-law writ of error the Court will examine whether a *judicial* discretion has been properly exercised.

**IV.** It appears by the opinion filed by Judge LACOMBE (106), that the opinion of the Circuit Court of Appeals on the libellant's first appeal herein (49 Fed. R., 583), "*did not discuss the question how far, if at all, "the conclusiveness of the judgment would be affected as "to the respondent by the fact, if it were a fact, that it "was secured by his deliberate perjury,*" and this Court will remember that it refused to hear argument on that question on the original appeal. This Court will also remember that when libellants presented their petition for a rehearing of their appeal, with a memoranda in support of their motion for reargument, referring therein, as the basis of said motion, to the case of Marshall vs. Holmes, 141 U. S., 596, that *no oral argument was permitted*, and the case *now* stands in a worse position than that criticised by Judge MATTHEWS in Sabariego vs. Maverick, 124 U. S., at page 29, "*castigatque auditque.*"

**V.** The respondent's brief charges that the libellants "*attempted to ignore the decision of this Court upon the "former appeal by obtaining permission to file an "amended libel, and, having obtained such permission,* "**used it improperly** *to amend the libel by reinsert-"ing the names of the owners of the 'John K. Shaw,' "although this Court had decided that the action could "not be maintained by them against the respondent, in-*

" *asmuch as the action in rem against the steamship* " ' *Newport' was res adjudicata between the owners of* " *the vessel and this respondent.*"

I have a word to say in reference to this assertion :

(1) This Court decided (49 F. R., 583) that the plea of *res adjudicata* presented by the respondent's answer was not a defense to the claim of the Virginia Home Insurance Company, as insurers of cargo (49 F. R., 585).

(2) As the plea of *res adjudicata* was no defense to the claim of the Virginia Home Insurance Company, it is manifest that **they had no reason for avoiding it** by setting up that the judgment in Hatch vs. The Newport had been procured by the perjured evidence of the respondent, and the suggestion or insinuation that the amendment by libellants—entitled in their motion papers *in the case of Bailey vs. Sundberg* (19), entitled, also, in Bailey vs. Sundberg in the order entered by the Court granting that motion (25)—was intended by the Court to be limited to the claim of the Virginia Home Insurance Company, is ridiculous, and would need no comment but for the fact that it is a reflection upon the conduct of the counsel for the libellants, and is equally suggestive of a want of intelligence in the Court which signed that order.

(3) The charge is made that libellant's counsel is seeking to ignore or circumvent the decision of this Court on the first appeal, and that the present appeal is his *final* effort. This charge is equally uncalled for and false. Counsel for the libellant is endeavoring to secure justice for his clients, and the counsel for the respondent is dodging behind a breastwork of technicalities; he fears to face the issue "Did his client commit perjury ?" as alleged, and he seeks to avoid this issue and to prevent a full consideration by this Court of the questions presented, by the gagging process of a motion to dismiss the appeal.

**VI.** The brief for the respondent further recites: "*All of this argument*" (*i. e.*, that presented on the present appeal) "*was before the Circuit Court of Ap-*"*peals on the former appeal, and was considered.*" Judge LACOMBE says the contrary (107). At that time Marshall vs. Holmes had not been decided, and, whatever views of the law this Court took, under the *mistaken* impression that United States vs. Throckmorton was controlling, must be modified when the case of Marshall vs. Holmes is properly considered.

In the prevailing opinion delivered in the Court of Errors of the State of New York in the case of **Yates vs. Lansing,** 9 Johns., 415, Senator Platt says:

"It is proper to notice a preliminary objection in-
"sisted on by the counsel for Mr. Yates. They con-
"tend that the door to these inquiries is now shut by
"the decision of this Court, at its last session, in the
"case of John V. N. Yates and The People.

"I cannot admit the doctrine of *immutability* in the
"decisions of this Court, to the unqualified extent
"claimed by the plaintiff's counsel.

"The decisions of Courts are not the law; they are
"only *evidence of the law.* And this evidence is
"stronger or weaker, according to the number and
"uniformity of adjudications, the unanimity or dissen-
"sion of the Judges, the *solidity of the reasons* on
"which the decisions are founded, and the perspicuity
"and precision with which those reasons are ex-
"pressed."

Whatever force or weight is to be given to a decision it is clear that *one in which there has been no argument and no opportunity for argument by counsel ought not to be deemed decisive.*

**Lastly.** Assuming that this Court will not be astute in finding reasons for dismissing this appeal *on any ground other than that specified in the motion papers and the brief of respondent's counsel,* the libellant's counsel

has not now attempted to cover any larger ground than that presented by those papers.

The amendment allowed by the Circuit Court (27) supplied the necessary allegations to bring the libellant's case within the strictest requirements of even *equity* (as distinguished from *admiralty*) pleading. Neither that amendment nor any equivalent for it was *ever* before this Court, and there can be no pretense that with it in the libel the libellants have not a clear right to try the case so made.

**The Mary**, 9 Cranch, 126, MARSHALL, C. J.: "The "decisions of a court of *exclusive* jurisdiction are "necessarily conclusive in all other courts, *because* "the subject matter is not examinable in them.

**"With respect to ITSELF, no reason is "perceived for yielding them a further "conclusiveness than is allowed to the "judgments and decrees of courts of com-"mon law and equity;** *they bind the subject matter* "*as between parties and privies.*"

I refer to my brief in chief for a full argument on the merits.

If this Court shall find that it has *mistaken* the law and that it is not as stated by Judge LACOMBE in his opinion in this case at folio 106 of the Apostles, it now has the opportunity to do *justice* (admiralty justice) to the libellants, and afford them that fair opportunity for presenting *the merits of their case* of which they have been so long deprived.

Dated November 3d, 1893.

Respectfully submitted,

GEO. A. BLACK,

Proctor for Libellants,

44 Pine Street, N. Y.

# United States Circuit Court of Appeals

## FOR THE SECOND CIRCUIT.

GEORGE BAILEY ET AL.,
*Libellants and Appellants,*

*vs.*

JOHN P. SUNDBERG,
*Respondent and Appellee.*

# TRANSCRIPT OF RECORD.

**Appeal from the Circuit Court of the United States for the Southern District of New York.**

PRINTED UNDER THE DIRECTION OF THE CLERK.

# INDEX.


| | PAGE |
|---|---|
| Statement | 1 |
| Mandate from United States Circuit Court of Appeals | 4 |
| Third Amended Libel | 6 |
| Affidavit of George A. Black, Proctor for Libellants | 7 |
| Order granting leave to Amend Libel | 9 |
| Order on Mandate dismissing Third Amended Libel | 11 |
| Amended Libel in United States Circuit Court | 12 |
| Notice for Order directing N. Y. & C. M. S. S. Co., &c., Garnishees, to transfer Stock, &c | 24 |
| Certificate of N. Y. & C. M. S. S. Co. as to Shares of Stock standing in name of John P. Sundberg | 25 |
| Certificate of James E. Ward & Co. as to Bonds of Sundberg in their possession, &c. | 26 |
| Affidavit of William W. Goodrich | 27 |
| Order for Garnishees to transfer Stock | 29 |
| Notice of Resettlement of Order | 31 |
| Respondent's Brief | 33 |
| Opinion of Circuit Court of Appeals, LACOMBE, *J.* | 36 |
| Opinion of Circuit Court, LACOMBE, *J.* | 38 |
| Order granting Motion to resettle Order, and striking last Amended Libel off files and vacating Order for Amendment thereof | 39 |
| Notice of Appeal | 40 |
| Stipulation as to Record on Appeal | 40 |
| Assignment of Errors | 41 |
| Petition of Appeal and Allowance | 42 |
| Citation | 45 |
| Clerk's Certificate | 46 |

# United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

GEORGE BAILEY *et al.*
Libellants and Appellants,

vs.

JOHN P. SUNDBERG,
Respondent and Appellee.

## STATEMENT.

This action was commenced on February 5, 1890, by the filing of a libel in the District Court of the United States for the Southern District of New York, and the issue of process *in personam* with clause of foreign attachment under which the credits and effects of the respondent in the hands of The New York and Cuba Mail Steamship Company and of the firm of James E. Ward & Co. were attached and certificates filed by said garnishees showing the property of the respondent in their hands at the time of the attachment. Respondent filed his answer to said libel on June 16, 1890, to which answer libellants filed exceptions. On October 16, 1890, said exceptions were overruled by the District Judge. On December 22, 1890, libellants, by leave of the

4 Court, filed an amended libel, to which the respondent filed exceptions on December 29, 1890. On March 21, 1891, the District Judge made a decree sustaining said exceptions and dismissing the libel. From said decree libellants appealed on March 24, 1891, to the Circuit Court of the United States for the Southern District of New York, which Court on the 7th day of July, 1891, affirmed the said decree of the District Court *pro forma*. Libellants appealed to this Court from said decree of the Circuit Court on July 14, 1891.

1892.

July 20. Mandate of Circuit Court of Appeals sustaining respondent's exceptions to
5 third amended libel, and directing that Circuit Court dismiss the third amended libel of Bailey *et al.*, owners of the schooner *John K. Shaw*, filed in Circuit Court.

" " Motion in Circuit Court by libellants' Bailey *et al.*, to amend their third amended libel, argued.

" " Motion by respondent for a decree of Circuit Court in conformity to mandate, argued.

July 25. Order of Circuit Court, granting libellants, motion to amend their third amended libel, and that respondent answer same.
6

" 26. Order of Circuit Court in conformity to mandate.

Aug. 4. Amended libel filed in Circuit Court, in conformity to order of July 25, 1892.

" 31. Motion by libellants, that garnishees give bond and otherwise comply with Rule 29, of District Court, and Rule 136 of Circuit Court, argued.

Oct. 13. Order that garnishees give bond, &c.

" 20. Motion by respondent to reargue motion as to garnishees, argued—no order thereon.

Oct. 24. Reargument of libellants' motion (argued July 20, 1892), for leave to amend their third amended libel of District Court, on grounds stated in respondent's brief. 7

Dec. 1. Memorandum of Circuit Court of Appeals as to reasons for denying libellants' petition, presented May 23, 1892, for reargument of their appeal filed, in which Lacombe, *J.*, allowed further argument of motion to amend, &c.

" 5. Further argument before Lacombe, *J.*, on motion to amend.

" 10. Memorandum of Lacombe, *J.*, on motion to reargue and vacating order of July 25, 1892, granting libellants' motion to amend their third amended libel. 8

" " Order of Circuit Court vacating order to amend libel and striking amended libel from files, and vacating order requiring garnishees to give bond, &c.

" 22. Appeal by libellants (other than Virginia Home Insurance Company) from Circuit Court order of December 10, 1892, to Circuit Court of Appeals filed.

The names of the libellants are as follows: George Bailey, Horace H. Chittenden, as assignees of Alfrederick S. Hatch; Charles R. Harrington and William Anderson, as executors of David Carll, deceased; Franklin Osborn, Charles Osborn, John A. Laird, Jane Laird, Charles H. Valentine, William H. Bailey, George W. Piper, S. E. Birdsall, as executor of the last will and testament of Lemuel H. Hopkins, deceased, and Euphemia Osborn, as administratrix of Lucien Osborn, deceased, owners of the three-masted schooner *John K. Shaw*, and the Virginia Home Insurance Company, 9

The name of the respondent is John P. Sundberg.

There has been no change of parties since the commencement of the suit.

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE CIR-
[L.S.] CUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between George Bailey, Horace H. Chittenden, as assignee of Alfrederick S. Hatch; Charles R. Harrington and William Anderson, as executors of David, Carll, de-
11 ceased, Franklin Osborn, Charles Osborn, John A. Laird, Jane Laird, Charles H. Valentine, William H. Bailey, George W. Piper, S. C. Birdsall, as executor of Lemuel H. Hopkins, deceased, and Euphemia Osborn, as administratrix of the estate of Lucien Osborn, deceased, owners of the schooner *John K. Shaw*, and the Virginia Home Insurance Company, insurers of the cargo of coal laden on board of said schooner, libellants, and John P. Sundberg, respondent, a decree was made on the 7th day of July, 1891, dismissing the libel therein upon the exceptions filed thereto by the respondent, as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by
12 virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present Term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it was ordered, adjudged and decreed that the said decree of the Circuit Court so far as the same dismissed the libel as to the libel-

lant the Virginia Home Insurance Company be re- 13
versed without costs of appeal, and that so far as the same dismissed the said libel as to George Bailey and others, the other libellants, the owners and representatives of the master of the schooner *John K. Shaw*, the same be affirmed without costs of appeal; and that a mandate issue to the Circuit Court of the United States for the Southern District of New York, with instructions to dismiss the libel as to all libellants except the Virginia Home Insurance Company, and as to that libellant to overrule the exceptions of the respondent to the amended libel, and to take such further proceeding as may be proper in conformity with the decision of this Court and the provisions of said decree.

14 You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said decree notwithstanding.

Witness, the Hon. Melville W. Fuller, Chief Justice of said Supreme Court, the 29th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court
of Appeals for the Second Circuit.

15

16 TO THE HONORABLE ADDISON BROWN, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The third amended libel and complaint of George Bailey, shipmaster of Manasquan, N. J.; Horace H. Chittenden of the City of New York, attorney at law, as assignee of Alfrederick S. Hatch; Charles R. Harrington and William Anderson, as executors of David Carll, deceased, late of City Island, N. Y.; Franklin Osborn, farmer of Manasquan, N. J.; Charles Osborn, farmer of Manasquan, N. J.; John A. Laird, merchant of Freehold, N. J.; Jane Laird, wife of John A. Laird, of same place; Charles H. Valentine, merchant of Atlanticville,
17 N. J.; William R. Bailey, farmer of Manasquan, N. J.; George W. Piper, merchant of Williamsburgh, N. Y.; S. E. Birdsall, as executor of the last will and testament of Lemuel H. Hopkins, deceased, late of Hoboken, N. J.; and Euphemia Osborn as administratrix of the estate of Lucien Osborn, deceased, late of Manasquan, N. J., owners of the three masted schooner *John K. Shaw*, and the Virginia Home Insurance Company, a corporation organized under the laws of the State of Virginia, and having its principal office in Richmond, Va., insurer of the cargo of coal laden on board said schooner, against John P. Sundberg, of the City of Brooklyn, N. Y., master of the steamship *Newport*,
18 in a cause of collision civil and maritime, alleges as follows.

[Then follows all the allegations which appear in the libel hereinafter set forth, addressed to the Hon. Wm. J. Wallace, except that part of the eighth article, which is printed in *italics*, being the paragraph commencing with the words "That without negligence," and ending with the words, "east of south."]

Said libel was verified December 20, 1890, and filed December 22, 1890.

The said libel above referred to may be used, omitting such italicised matter as if here set forth.

U. S. CIRCUIT COURT. 19

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG.

Southern District of New York, ss.:

GEORGE A. BLACK, being duly sworn, says:

That he is the proctor for the libellants. That on 20
the 29th day of March, 1892, by a mandate of the Circuit Court of Appeals, this cause was remanded to this Court with instructions to dismiss the libel herein as to all the libellants except the Virginia Home Insurance Company, and that since the argument of this cause in said Circuit Court of Appeals, which occurred in December, 1891, and since the decision in that Court, which was known January 18, 1892, the case of Marshall against Holmes, 141 U. S., 600, has been published and come to the attention of deponent, and that in view of that decision the libellants desire to amend their libel herein as follows:

21
"That without negligence, laches or other fault on the part of the libellant, the respondent, by his false evidence, given in the case of Hatch *vs.* Steamer *Newport*, enabled the claimants of said steamship to obtain the judgment therein, which judgment is now set up as *res adjudicata* against these libellants, and that it is against conscience to allow him to have the benefit of said judgment, so secured by the false evidence given by himself, which result said libellants were unable to prevent without any fault or negligence on their part. That

the witnesses who could prove the said false evidence of the said respondent were known to said respondent and were not known to the libellant, and could not have been ascertained with due care on their part at that time, and that some of the said witnesses were the crew and passengers of the said steamship *Newport*, whose names are set forth in the libel herein, and that in rendering the decision in the said case of Hatch against The *Newport* the Court was misled and deceived by the said respondent, who was the only witness who swore to the course of said steamer being east of south."

That said allegations above mentioned, and which are true, were omitted from the amended libel herein by inadvertence, and in ignorance of the said decision, and that the issues now proposed to be raised have not been considered by the said Circuit Court of Appeals in this case.

GEO. A. BLACK.

Sworn to before me this 31st day of March, 1892.

LAWRENCE KNEELAND,
[SEAL.] Notary Public,
Kings Co.,
Cert. filed in N. Y. Co.

**Order granting leave to Amend Libel.** 9

25

At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the Post Office Building, in New York City, on the day of April, 1892.

Present—Hon. E. HENRY LACOMBE,
*Circuit Judge.*

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG.

26

An appeal having been taken herein to the United States Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, entered herein on the 6th day of July, 1891, dismissing the amended libel herein, and said Court having issued its mandate which was duly filed herein on March 29, 1892, wherein it is directed to dismiss the amended libel herein as to all the libellants except the Virginia Home Insurance Company, and as to that libellant to overrule the exception of the respondent to the 27
amended libel, and take such further proceedings as may be proper in conformity with the decree of said Circuit Court of Appeals.

And the libellants having moved to amend their last amended libel herein by alleging as follows:

"That without negligence, laches or other fault on the part of the libellant, the respondent, by his false evidence, given in the case of Hatch *vs.* The Steamer *Newport*, enabled the claimants of said steamship to obtain the judgment therein, which judgment is now set up as *res adjudicata* against these

28

libellants, and that it is against conscience to allow him to have the benefit of said judgment, so secured by the false evidence given by himself, which result said libellants were unable to prevent without any fault or negligence on their part. That the witnesses who could prove the said false evidence of the said respondent were known to said respondent, and were not known to the libellants, and could not have been ascertained with due care on their part at that time, and that some of the said witnesses were the crew and passengers of the said steamship *Newport*, whose names are set forth in the libel herein, and that in rendering the decision in the said case of Hatch
29 against The *Newport*, the Court was misled and deceived by the said respondent, who was the only witness who swore to the course of the said steamer being east of south:"

Now, on reading and filing the mandate of the said Circuit Court of Appeals and the affidavit of George A. Black, and notice of motion to amend said amended libel, and after hearing A. F. Cushman, of counsel for respondent, it is

Ordered, that the said libellants have leave to amend their said last amended libel by inserting therein the said amendment so moved for, and that respondents have leave within ten days from the service of a copy of this order to answer such of the
30 amendments to the libel as set forth matter in confession and avoidance.

July 25, 1892.

(Signed) E. HENRY LACOMBE.

## Order on Mandate dismissing Third Amended Libel.

At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the Post Office Building in New York City, on the 20th day of July, 1892.

Present—Hon. E. HENRY LACOMBE,
*Circuit Judge.*

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG.

An appeal having been taken herein to the United States Circuit Court of Appeals for the Second Circuit from a final decree of this Court, entered herein on the 6th day of July, 1891, dismissing the amended libel herein, and said Court having issued its mandate which was duly filed herein on March 29, 1892, wherein it is directed to dismiss the amended libel herein as to all the libellants except the Virginia Home Insurance Company, and as to that libellant to overrule the exceptions of the respondent to the amended libel and take such further proceedings as may be proper in conformity with the decree of said Circuit Court of Appeals: Now, on motion of Goodrich, Deady & Goodrich, proctors for the respondent, it is

Ordered, adjudged and decreed, in conformity with said mandate, that the amended libel herein be and the same is hereby dismissed as to all the libellants except the libellant The Virginia Home Insurance Company, without costs in this Court, and that as to said libellant the exceptions of the respondent to the amended libel herein be and the same are hereby overruled without costs in this Court, and that the respondent be and he is hereby permitted within ten days from the entry thereof to file an answer to the amended libel herein.

July 26, 1892.

E. HENRY LACOMBE.

34 TO THE HONORABLE WILLIAM J. WALLACE, JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The amended libel and complaint of George Bailey, shipmaster of Manasquan, N. J.; Horace H. Chittenden of the City of New York, attorney at law, as assignee of Alfrederick S. Hatch; Charles R. Harrington and William Anderson, as executors of David Carll, deceased, late of City Island, N. Y.; Franklin Osborn, farmer of Manasquan, N. J.; Charles Osborn, farmer of Manasquan, N. J.; John A. Laird, merchant of same place; Charles H. Valentine, merchant of Atlanticville, N. J.; William H. Bailey,
35 farmer of Manasquan, N. J.; George W. Piper, merchant of Williamsburgh, N. Y.; S. E. Birdsall, as executor of the last will and testament of Lemuel H. Hopkins, deceased, late of Manasquan, N. J., owners of the three-masted schooner, *John K. Shaw* and the Virginia Home Insurance Company, a corporation organized under the laws of the State of Virginia, and having its principal office in Richmond, Va., insurer of the cargo of coal laden on board said schooner, against John P. Sundberg, of the City of Brooklyn, N. Y., master of the steamship *Newport* in a cause of collision, civil and maritime, alleges as follows:

36 FIRST.—That at the time hereinafter mentioned, the libellants above named as such, were the owners of the three-masted schooner *John K. Shaw;* that Lucien Osborn was the master of said schooner *John K. Shaw*, and had property belonging to him on board, and was, as libellants are informed and believe, drowned in consequence of the collision hereinafter set forth, and that Euphemia Osborn is the duly authorized administratrix of his estate.

That the Virginia Home Insurance Company is a duly incorporated company, and was the insurer of the cargo of four hundred and twenty-four and $\frac{140}{2240}$

tons of coal laden on board said schooner, and has 37
paid a total loss thereon, and was duly subrogated to the rights of the Cannelton Coal Company, the owners of said coal.

That the said Horace H. Chittenden is the assignee of the said Alfrederick S. Hatch for the benefit of creditors under an assignment duly executed and filed.

That the said Charles R. Harrington and William Anderson are the executors of the last will and testament of David Carll, deceased, under letters testamentary granted to them by the Surrogate of Westchester County, N.Y., on March 25, 1889.

SECOND.—The libellants are informed and believe 38
that every person upon the said schooner was drowned by reason of the collision hereinafter set forth, and libellants therefore allege, upon information and belief, that on the 23d day of February, 1884, at about six o'clock and forty minutes in the evening, the said three-masted schooner *John K. Shaw*, while on a voyage from Newport News, Virginia, to New Haven, Connecticut, laden with a cargo of coal and pig-iron, and at a point off the eastern coast of New Jersey, about four miles from shore, and between Asbury Park and Long Branch, was run into and sunk by the steamship *Newport*.

THIRD.—The libellants, upon information and 39
belief, allege that at the time of said collision it was after dark, the evening clear, the stars shining, but no moon, and a strong wind was blowing from about the northwest. The schooner was sailing close-hauled on the port tack, heading about N. by E. She was tight, staunch and strong, and in all ways properly manned and equipped, and as libellants believe, had a sailor of experience on the lookout forward and an experienced and capable officer at the wheel. Her lights were lit and properly placed, and burning brightly.

40 FOURTH.—Libellants allege, on information and belief, that the steamer *Newport* sailed from New York for Havana on February 23, 1884, under the command of respondent as master, passing out to sea through the Swash and South Channels on the usual channel course of about S. E. ½ S. and at 5.35 P. M. had the Sandy Hook light bearing abeam, and at 5.40 had Sandy Hook light bearing west, and at 5.50 passed Scotland Lightship, bearing west and about a quarter of a mile distant, and then took a course of about S. ½ W., which she kept up to the time of her collision with the schooner *John K. Shaw* at 6.40 P. M.

The *Newport's* speed after passing the Scotland
41 Lightship down to the collision was about fourteen knots an hour.

The schooner was sighted by the steamer's look-out and reported to the proper officer when the schooner was distant about a mile and a half or two miles, slightly on the steamer's starboard bow. The schooner was going through the water at about a speed of seven knots per hour.

The steamer did not alter her course or speed until the vessels were close together, when she sheered to starboard so that with the bluff of her starboard bow she struck the schooner on her starboard quarter about the mizzen rigging, crushing in the side of the schooner, and so injuring her that within a few moments she sank and all on board were lost.

42

FIFTH.—That the said collision was caused wholly by the negligence and improper conduct of those navigating the steamer *Newport*, in that she did not take timely and effective measures to avoid the said schooner, and did not port her helm instead of starboarding it.

SIXTH.—That by said collision and the loss of said schooner the libellants have suffered damage in the amount of her value, the sum of twenty thousand

($20,000) dollars; in her pending freight about 43
the sum of seven hundred and twenty ($720) dollars; personal property of the master about the sum of eight hundred ($800) dollars, and the loss of the cargo of coal laden on board, about the sum of three thousand ($3,000), dollars, amounting together to the sum of twenty-four thousand five hundred and twenty ($24,520) dollars, with interest thereon from the 23d day of February, 1884.

SEVENTH.—And by leave of the Court the libellants answering the new matter set forth in the answer of the respondent herein in the seventh article of the said answer, admit that the libel of Alfrederick S. Hatch and others, named in the seventh article of 44
said answer, was filed on the 24th day of April, 1884, as therein alleged; but libellants allege that in said libel the only damage sought to be recovered was fifteen thousand ($15,000) dollars for the sinking and total loss of the schooner *John K. Shaw.*

And libellants allege that upon the filing of the said label and on the same day, process was issued by the said District Court to the Marshal of the United States for the Southern District of New York, requiring him to attach the said steamship *Newport*, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, to appear in 45
the said District Court on the 13th day of May, 1884, then and there to interpose a claim for the same, and to make their allegations in that behalf. That the said Marshal executed the said process on the same day so far only as to attach the said steamship *Newport*, but did not give any notice or otherwise execute the said process.

And libellants allege that on the 25th day of April, 188 , the New York and Cuba Mail Steamship Company intervened as the sole owner of the said steamship *Newport*, praying to defend accordingly, and its

46 claim as such owner was duly filed on that day, and that on the said 25th day of April, 1884, the said New York and Cuba Mail Steamship Company, with stipulators, entered into a bond to the Marshal of the United States for the Southern District of New York in the sum of seventeen thousand five hundred ($17,500) dollars, which bond recited the filing of the said libel, the issuing of said process, and that the said steamship was then in the custody of the said Marshal under said process, and the making and filing of the claim to said steamship by the said company, which bond libellants allege was by the consent of the proctor of the libellant in said suit of Hatch *vs. The Newport* duly approved and filed, and
47 thereupon an order of the said District Court was duly entered for the discharge of the said steamship from custody, and duly delivered to said Marshal, who thereupon, on the same day, discharged the same.

And libellants admit that on or about the 8th day of July, 1884, the said libellants Hatch and others named in said seventh article of the answer, filed in the said District Court, by leave of the Court, a supplemental libel in said action, in which they alleged the total loss of the schooner *John K. Shaw*, of the value of twenty thousand ($20,000) dollars; her freight moneys of the value of five hundred ($500) dollars of the personal property of the master, of the value
48 of four hundred and sixty-two ($462) dollars, and personal property belonging to the crew of said schooner of the value of one hundred ($100) dollars, amounting in all to twenty-one thousand and sixty-two ($21,062) dollars.

And libellants allege that on the 8th day of July, 1884, upon the filing of said supplemental libel, by an order of the said District Court, the said claimants were required to give additional security to the said libellants in the sum of three thousand ($3,000) dollars.

And libellants allege that on the 11th day of Au-

gust, 1884, the said claimants of the said steamship 49
*Newport*, entered into a further bond, with sureties, to the Marshal of the United States for the Southern District of New York, in the further sum of three thousand ($3,000) dollars, pursuant to the order of said District Court.

And libellants allege that the said steamship *Newport* was not appraised at the time of said attachment, or at any time thereafter, and that her value was more than fifty thousand ($50,000) dollars.

And the libellant the Virginia Home Insurance Company alleges separately, and the other libellants for their interests also allege, that no publication of notice was ever made in said cause, as is required by the rules and practice of the said District Court, and 50
that no public notice as required by Rule 9 of the Admiralty Rules of the United States Supreme Court was given by the said Marshal of the arrest of said steamship *Newport*, nor of the time assigned for the return of said process and the hearing of the cause, in any newspaper within the said district or in any other public place in the said district, and that at that time there were newspapers published in said district; and that no notice was published or affixed in the manner directed by the act of Congress (now Sec. 923 of the Revised Statutes of the United States) in cases of seizure on the part of the United States, as required by District Court Rules 46 and 171, nor was any special order made by the 51
Judge directing a shorter notice.

And libellants allege that the said libel and supplemental libel sought only to recover for damage to the schooner *John K. Shaw*, her freight-money and personal effects of the crew, and did not seek in anywise to recover for the loss of the cargo laden on board of said schooner.

And libellants admit that the answer of the said New York and Cuba Mail Steamship Company, as owner of the said steamship *Newport* was filed and that the trial of the is-

52 sues raised by said pleadings was had in the District Court of the United States for the Southern District of New York, and a final decree dismissing said libel entered, as alleged in said seventh article of the respondent's answer, and that thereupon the said libellants, in said article described, appealed to the Circuit Court, as therein alleged, and upon said appeal filed an amended libel, as in said article alleged, still claiming only for the damage done to said schooner *John K. Shaw*, freight-money and personal effects of the crew.

And the said libellants admit that additional testimony was taken in the Circuit Court, and another trial had therein, and a decision made ordering the
53 libel dismissed, as alleged in said seventh article; but libellants deny that any decree was entered thereon, and they admit that said libellants applied for a rehearing and reargument of said case on the same evidence, and that the said rehearing was denied.

And said libellants admit that a motion was made to reopen the case and to examine Leonard S. Holmes, formerly second officer of the steamship *Newport*, and that the same was opposed by the claimants of the said steamship *Newport*, and was denied.

And libellants allege that at the time of the arrest of said steamship *Newport* under said process on
54 April 24, 1884, the respondent was not master thereof, and that there was no proclamation or default on the return of process on May 13, 1884.

EIGHTH.—And, by leave of the Court, the libellants, answering the new matter set forth in the eighth article of the answer of the respondent herein, admit that one of the issues in said action was whether there had been any collision between the schooner *John K. Shaw* and the steamship *Newport*, and admit that the same was examined and inquired into, and a large number of depositions taken, and a large

number of witnesses, including the respondent herein, were examined. 55

And libellants deny that it will be impossible for the respondent to obtain the testimony of the witnesses examined on the trial of the case of Hatch against the *Newport*, and they allege that they have offered in writing to stipulate that all of the evidence given on said trial might be used in evidence on the trial of this cause.

And libellants admit that both of said Courts in the said action against the *Newport* patiently and carefully investigated the circumstances involved in said pleadings; but the libellants allege that the same were not fully investigated by reason of the failure and omission of the claimants of the said steamship 56
*Newport* to produce the persons who were in charge of the navigation of the said steamship at the time of said collision, and who were witnesses of the same and knew of the facts relating thereto.

And libellants specifically charge that the claimants of the said steamship purposely omitted in both the District and Circuit Courts to call and examine Leonard S. Holmes, the second officer of said steamship, who was on the bridge at the time of said collision; the quartermaster Nicholas Francis, who was at the wheel of said steamship at the time of said collision; the quartermaster George Churchill, who was at the wheel of said steamship when she passed Scotland Lightship, and the engineers Evans and 57
Fitzpatrick, who were in charge of the engines of said steamship at the time of and immediately after said collision—all of whom knew that said schooner had been sunk by the fault of said steamship; and also purposely omitted to call and examine of the crew of said steamship, Lars Amundsen, seaman, and Henry Ferguson, pantryman, who saw said schooner sink after said collision; Charles W. Perotty, second cook, who heard cries for help after said collision; Martin Bryan, Peter Curran, William Freel, Louis King, Patrick Lunday and Lawrence

58 Mulligan, coal passers; George Carson, water tender, and John Menegh, Michael Quinn and Michael Quigley, firemen, all of whom knew of and felt the shock of the collision, and were able to testify to the severity thereof as sufficient to sink said schooner, and to circumstances showing that the same was caused by the misconduct of those in charge of said steamship, and to the opinion of those on board that the said schooner had perished in said collision, and one of whom, Lundy, had seen her capsized and sinking. And that the said claimants failed and neglected to call or produce as their witnesses on said trial, or for examination by the libellants, James H. Hamlen, a passenger, who saw said schooner
59 capsized by said collision, and Richard M. Blakemore, Clara Brower, George Ward, Sarah E. Ward, John M. Wetherill, Aquilla Womelsdorf and Sophie M. Womelsdorf, all passengers on said steamship, who knew of the circumstances attending said collision, and felt the severity of the shock thereof, and knew of the conviction that the said schooner had been sunk by the same, and of other circumstances proving that the said schooner so sunk was the *John K. Shaw.*

And libellants allege that the failure to call and examine said witnesses was by the advice and procurement of the respondent herein.

And libellants allege that while it is true that the
60 District Court decided that the *Newport* did not touch the *John K. Shaw*, and that her course carried her several miles distant from the place of the sinking of the *Shaw*, yet it is also true that such result was produced by the false statements and evidence given by the respondent herein, and all the other witnesses produced on the trial by the claimants of the said steamship, and by the conduct of the respondent in relation to said collision, and by his failure to save the lives of those who were on board said schooner, who could have testified for the libellants and convicted the said steamer.

And libellants allege that the respondent falsely 61
swore on the trial of the said cause that the steamship *Newport* passed the Scotland Lightship one and a half miles to the eastward, and then took a course of about S. by E., and that she was at the time of her admitted collision with a three-masted schooner which was bound north, seven or eight miles off the coast, and fifteen miles to the southward of Scotland Lightship. And that the said respondent also falsely swore that he did not believe or know that the schooner they had struck had sunk, and that the respondent also falsely swore that he saw the light of Scotland Lightship after said collision on a bearing of N. by W. westerly; that he also falsely swore that the shock of the said 62
collision was not severe enough to damage the said schooner, and in other particulars material to the issues of the trial the respondent also gave false testimony, all of which influenced and controlled the said Court in making its said decision.

*That without negligence, laches or other fault on the part of the libellants, the respondent, by his false evidence, given in the case of Hatch vs. The Steamer Newport, enabled the claimants of said steamship to obtain the judgment therein, which judgment is now set up as* RES ADJUDICATA *against these libellants, and that it is against conscience to allow him to have the benefit of said judgment, so secured by the false evidence given by himself, which result said libellants* 63
*were unable to prevent without any fault or negligence on their part. That the witnesses who could prove the said false evidence of the said respondent were known to said respondent, and were not known to the libellants, and could not have been ascertained with due care on their part at that time, and that some of the said witnesses were the crew and passengers of the said steamship Newport, whose names are set forth in the libel herein, and that in rendering the decision in the said case of Hatch against*

64 *The Newport, the Court was misled and deceived by the said respondent, who was the only witness who swore to the course of the said steamer being east of south.*

And libellants further admit that the Circuit Court in its first decision held that the steamship *Newport* was two and a half to three and a half miles distant from the place where the *John K. Shaw* was found sunk, and on the decision of the motion for a rehearing, that she was a mile and a half distant therefrom, and also found that the *Newport* never struck or sunk the said schooner; and libellants allege that all of the said findings made by the said Circuit Court were based upon and influenced and controlled
65 by the said false testimony of the said respondent.

And libellants deny that the said adjudications are or of right ought to be an estoppel and *res adjudicata* against the libellants or either of them.

NINTH.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellants pray that the process of the District Court issued herein may stand against said John P. Sundberg, and that he may be compelled to appear and answer upon oath all and singular the matters aforesaid, and that the attachment issued
66 against his goods and chattels stand; that the process also issued against the New York and Cuba Mail Steamship Company and against Henry P. Booth and William T. Hughes, composing the firm of James E. Ward & Co., garnishees, stand, and that the credits and effects of the said John P. Sundberg in the hands of said garnishees remain attached, and that this Honorable Court will be pleased to decree payment of the damages aforesaid, with interest and

costs, and that libellants may have such other and 67
further relief as they may be entitled to receive.

GEORGE A. BLACK,
Proctor for Libellants.

Southern District of New York, ss.:

HORACE H. CHITTENDEN, being duly sworn, says: That he is one of the libellants above named; that he has read the foregoing amended libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true. 68

HORACE H. CHITTENDEN.

Sworn to before me this 2d day of August, 1892.

JOHN C. ROBINSON,
[SEAL.] Notary Public,
New York County.

Filed August 4, 1892.

69

70 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

vs.

JOHN P. SUNDBERG.

71 Please take notice that upon the certificates of the New York and Cuba Mail Steamship Company and of James E. Ward & Co., garnishees, dated and verified on May 29, 1890, and on all the proceedings herein and in pursuance of Rule 29 of the District Court of the United States for the Southern District of New York as adopted by Rule 136 of this Court, I shall apply to this Court at a stated term thereof to be held at the court rooms in the Post Office building, in the City of New York, on the 2d day of August, 1892, at eleven o'clock in the forenoon, for an order directing the said New York and Cuba Mail Steamship Company, garnishee, to transfer to the name of the Clerk of this Court, as trustee, the two
72 hundred shares of stock mentioned in its said certificate, and the said James E. Ward & Co., garnishees, to deposit and pay into Court the property described in their said certificate or to give stipulation with sufficient security to abide by the further order or decree of this Court in relation thereto, and for such other relief as may be just.

Dated July 29, 1892.

GEORGE A. BLACK,
Lblt.'s Proctor.

Messrs. GOODRICH, DEADY & GOODRICH,
Respts.' Proctors.

U. S. DISTRICT COURT, 73

SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG

This certifies that the New York and Cuba Mail Steamship Company had standing on the books of 74
said company in the name of John P. Sundberg when process herein was served upon said company, 200 shares of the capital stock of said company, par value $20,000.

Dated New York, May 20, 1890.

N. Y. AND CUBA MAIL S. S. Co.

Southern District of New York, ss.:

HENRY P. BOOTH, being duly sworn, says: That he is President of the New York and Cuba Mail Steamship Company; that the foregoing certificate is true to his own knowledge.

HENRY P. BOOTH, 75
President.

Sworn to before me this 29th day of May, 1890.

FREDERICK GIBLIN,
Notary Public,
Kings County.

Certificate filed in New York County.

76 U. S. DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG.

77 James E. Ward & Co. hereby certify that at the time of the service of process herein they had in their possession belonging to John P. Sundberg, fifteen bonds of the New York and Cuba Mail Steamship Company, par value $1,000 each, and standing to his credit on their books $193.76.

Dated New York, May 29, 1890.

JAMES E. WARD & Co.

Southern District of New York, ss.:

HENRY P. BOOTH, being duly sworn, says: That he is one of the firm of James E. Ward & Co.; that the foregoing certificate is true to his own knowledge.

HENRY P. BOOTH.

78 Sworn to before me
May 29, 1890.

FREDK. GIBLIN,
[SEAL.] Notary Public,
Kings County.
Certificate filed in New York County.

UNITED STATES CIRCUIT COURT, 79

SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG.

80

Southern District of New York, ss.:

WILLIAM W. GOODRICH, being duly sworn, says that he is one of the proctors for the respondent herein. That the original libel herein was filed to recover the sum of $24,520 and a warrant of attachment issued, and the certificates of James E. Ward and the New York and Cuba Mail Steamship Company were filed to secure the full amount claimed. That the District Court upon hearing dismissed the libel. That an appeal was taken to the Circuit Court of Appeals and the decree of the District Court reversed in so far as it dismissed the libel as to all the libellants except the Virginia Home Insurance Company, whose claim is for $3,000 or thereabouts. 81 That the order or decree in this Court upon the mandate of the Court of Appeals dismissing the libel as to all the libellants except said Insurance Company was entered July 27, 1892. That under leave granted by order entered July 29, 1892, the libellants have filed in this Court an amended libel on August 4, 1892, in the name of all the libellants, including said Insurance Company. Said libel proceeding as if no order had been made dismissing the libel which is now amended as to

82 all the libellants except the said Insurance Company.

That the respondent is ready and willing to give a bond or such other security as the Court may direct to secure the claim of the said Insurance Company, and asks on this motion that the amount of said security be fixed and that the respondent have an order canceling the certificates filed to secure the full amount claimed in the original libel upon the giving of such security, and he further asks that the libellants be further ordered to amend their libel by leaving out therefrom any claim for damages except on behalf of said Insurance Company.

W. W. GOODRICH.

Sworn to before me, this 31st
83 day of August, 1892.

AVERY F. CUSHMAN,
[SEAL.] Notary Public,
Kings County.

Certificate filed in New York County.

84

At a Stated Term of the Circuit Court of 85
the United States for the Southern District of New York, held at the Post Office Building, in the City of New York, on the 13th day of October, 1892.

Present—Hon. E. HENRY LACOMBE, *Justice.*

GEORGE BAILEY *et al.*

AGAINST

JOHN P. SUNDBERG. 86

Libellants having moved this Court under Rule No. 29 of the Rules of the District Court for the Southern District of New York, that the New York and Cuba Mail Steamship Company and Henry P. Booth and William H. T. Hughes, composing the firm of James E. Ward & Co., the garnishees herein, pay to the Clerk of this Court the stock, bonds and money in their hands and attached under the process herein, as appears by the certificate of said garnishees;

Now, on reading and filing the notice of motion and the affidavit of Wm. W. Goodrich, Esq., read 87
in opposition thereto, and after hearing Geo. A. Black, Esq., proctor for libellants, and Avery F. Cushman, of counsel for respondent and said garnishees, it is

Ordered, that the New York and Cuba Mail Steamship Company, garnishees, transfer to the name of John A. Shields, as Clerk of this Court, as trustee, the two hundred shares of the capital stock of the New York and Cuba Mail Steamship Company, of the par value of twenty thousand dollars, standing in the name of

88 John P. Sundberg, the respondent herein, on the books of said company, when the process of attachment herein was served upon said company, and make out and deliver to said John A. Shields, as Clerk of this Court, as trustee, a certificate of said company in the usual form showing that said two hundred shares of its capital stock stands in his name on the books of said company, and that he is entitled thereto as trustee; and it is further

Ordered, that Henry P. Booth and William H. T. Hughes and the firm of James E. Ward & Co., garnishees, deliver to the said John A. Shields, as Clerk of this Court, as trustee, the fifteen bonds of the New York and Cuba Mail Steamship Company
89 of the par value of one thousand dollars each, belonging to John P. Sundberg, and attached in their hands at the time of the service of the attachment herein, and that the said Booth, Hughes and James E. Ward & Co. do all and every act necessary to vest the legal title to said fifteen bonds in the said John A. Shields, as Clerk of this Court, as trustee, and also pay and deliver to him the sum of one hundred and ninety-three $\frac{76}{100}$ dollars, moneys of said John P. Sundberg, attached in their hands at the time of the service of the attachment herein.

Unless within ten days after a service of a copy of this order on Goodrich, Deady & Goodrich, their proctors, the said garnishees shall enter into a
90 stipulation in the sum of $5,000, with sufficient sureties, who shall justify on two days' notice to libellants' proctor and be approved by the Court that they will pay to the libellants such sums of money not exceeding said sum of five thousand dollars and interest thereon from the date of such stipulation as shall be necessary to make up the amount of any decree with interest thereon which libellants or either of them may recover against said respondent, and that they will abide by and perform the orders and decrees of this Court or of any appellate Court and perform the terms of their stipulation

upon notice in writing to their said proctors, with 91
liberty to libellants to apply to this Court for any further or other order respecting said attached property as may be proper, and with liberty to the claimant to move as they may be advised for leave to sell or otherwise dispose of any of the said shares of stock and the bonds in the hands of the said garnishees.

October 13, 1892.

(Sgd.) E. H. LACOMBE.

---

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK. 92

GEORGE BAILEY *et al.*

vs.

JOHN P. SUNDBERG.

Sir,—Please take notice that the order entered herein on the 13th day of October, 1892, will be presented to the Hon. E. Henry Lacombe, a Judge of this Court, in the Post Office Building, in the City of 93
New York, on the 20th day of October, 1892, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for resettlement in the following manner:

By striking out all of said order after the word "herein" at the bottom of page 2 of said order, and inserting in place thereof the following:

"Unless within ten days after service of a copy of this order on Goodrich, Deady & Goodrich, his proctors, the respondent shall enter into a stipulation in

the sum of $5,000 with sufficient sureties, who shall justify on two days' notice to libellants' proctor and be approved by the Court or by said proctor that they will pay to the libellants or any of them such sums of money not exceeding said sum of $5,000, and interest thereon from the date of such stipulation, which libellants or either of them may recover against the said respondent, and that they will abide by and perform the orders and decrees of this Court or of any appellate court and perform the terms of their stipulation upon notice in writing to his said proctors, with liberty to the libellants to apply to this Court for any further or other order respecting said attached property as may be proper, and with liberty to the respondent or garnishees to move as they may be advised for leave to sell or otherwise dispose of any of the said shares of stock and the bonds in the hands of the said garnishees or for the cancellation of their certificates."

And for such other and further relief as may be just.

Yours, &c.,

GOODRICH, DEADY & GOODRICH,
Proctors for Respondent.

To GEORGE A. BLACK, Esq.,
Proctor for Libellants.

U. S. CIRCUIT COURT. 97

GEORGE BAILEY *et al.*

vs.

JOHN P. SUNDBERG.

Respondent's Brief.

The mandate of this Court, entered on the 20th of July, 1892, ordered that the amended libel be dismissed as to all the libellants except the Virginia 98
Home Insurance Company.

In pursuance of this mandate the respondent claims that all of the libellants except the Insurance Company should be stricken out of the pleadings and record.

It is suggested that the fourth amended libel, filed herein on August 2, 1892, contains new matter which should suspend the operation of the mandate. Such new matter reads as follows:

"That without negligence, laches or other fault on the part of the libellants, the respondent, by his false evidence, given in the case of Hatch *vs.* The Steamer *Newport*, enabled the claimants of said steamship to obtain the judgment therein, which 99
judgment is now set up as *res adjudicata* against these libellants, and that it is against conscience to allow him to have the benefit of said judgment, so secured by the false evidence given by himself, which result said libellants were unable to prevent without any fault or negligence on their part. That the witnesses who could prove the said false evidence of said respondent were known to said respondent, and were not known to the libellants, and could not have been ascertained with due

100 care on their part at that time, and that some of the said witnesses were the crew and passengers of the said steamship *Newport*, whose names are set forth in the libel herein, and that in rendering the decision in the said case of Hatch *vs. The Newport* the Court was misled and deceived by the said respondent, who was the only witness who swore to the course of the said steamer being east of south."

This is the only new allegation in this libel; and this, we claim, is merely a renewal in new or different words of the allegations of the previous libel. It is, in substance, an allegation that without laches of the libellant, Sundberg, by false evidence in the *Newport* case, enabled the steamship to obtain a
101 judgment which is now set up as *res adjudicata*, and that the witnesses to prove the falsity of such evidence were not known to the libellant and could not be obtained by him.

We insist that this is almost identical with the allegations of the former libel. After alleging the failure to call specific witnesses the libel alleges as follows: "And libellants allege that the failure to call and examine said witnesses was by the advice and procurement of the respondent herein." "That such result was produced by the false statements and evidence given by the respondent herein and all the other witnesses produced on the trial by the claimants of the said steamship and by the conduct
102 of the respondent in relation to said collision, and by his failure to save the lives of those who were on board of the said schooner who could have testified for the libellants and convicted the said steamer."

In his points on the exceptions the libellants stated: "The amended libel asserts the suppression by the claimants of most material evidence with the connivance of respondent and the giving of false evidence by respondent which influenced and controlled the Court in its decision."

Thus it appears that the sole additional allegation

in the last amended libel is that the libellants were not guilty of negligence, laches or other fault in procuring evidence. The complete answer to this is the opinion of the Circuit Court of Appeals in this case, reported in 49 Federal Reporter, page 583. The Court held that "In the absence of special circumstances a delay of less than six years in bringing a libel for collision *in personam* will not be considered as laches, since courts of admiralty govern themselves by the analogies of common law limitations" (head-note). 103

At page 586 the Court says: "Inasmuch as the present action was commenced within six years from the time when the cause of action accrued and there is no special circumstance to charge the cargo owner with laches, we think there is no equitable bar to the suit on the ground of delay. Where there is nothing exceptional in the case courts of admiralty govern themselves by the analogies of common law limitations." 104

Thus it appears that the only new matter in the new libel has already been passed upon by the Court, and we claim that under that opinion the Court will not inquire into the question whether within six years the libellants have been guilty of negligence or not, and that, therefore, the proceeding should be amended by striking out the names of all these persons.

1 05

106 U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

GEORGE BAILEY

vs.

JOHN P. SUNDBERG.

107 LACOMBE, *Circuit Judge:* I seem to be solely responsible for the entanglement in which this case is now involved. The opinion of the Circuit Court of Appeals did not discuss the question how far, if at all, the conclusiveness of the judgment would be affected, as to respondent, by the fact, if it were a fact, that it was secured by his deliberate perjury. Upon the motion for reargument that point was the sole one made. The Court of Appeals denied the motion because its members were not satified that the Supreme Court intended by the language they used in Marshall *v.* Holmes, 141 U. S., 589 (the forged document case), to repudiate or modify the well-settled doctrine expounded in U. S. *v.* Throckmorton,
108 98 U. S., 61, that the conclusiveness of a judgment was not to be questioned, when pleaded in another suit, solely because it had been procured by perjured testimony; and we were further convinced that, even if Captain Sundburg had told a deliberate falsehood on the former trial, such action on his part did not prevent the unsucessful party on that trial from fully exhibiting his case. No memorandum was filed with this decision. In examining the point raised on the motion for reargument the record on the appeal was not before me, and in some way I received the impres-

sion that the facts on which libellant relied, and on 109
which he sought to sustain his point, were not fully
set forth in the amended libel. When, therefore,
the last amended libel was presented to me sitting
as Circuit Judge, that impression was confirmed
and I allowed the amendment, conceiving it was
but just that the final record should contain sufficient
averments to enable the Supreme Court, should
libellant eventually succeed in getting the case there,
to pass upon the point considered by the Court of
Appeals, but (as I thought) not fully disclosed on the
record. Had I looked more carefully into the *origi-*
*nal* papers, as I should have done, when application
to amend was made, I would have ascertained the
true cause of the application, as now disclosed, 110
namely, a belief on libellant's part that his motion
for reargument was denied only because he had
failed to excuse his delay. As this belief was a
mistaken one—due to the unfortunate circum-
stances that no memorandum was filed with the de-
cision of the Court of Appeals—and as the point
raised is one which could be properly made upon the
pleadings as they stood, and as the Court of Appeals
had already passed upon its merits, the disposition
of the motion should have been otherwise—unless
there be some other ground on which libellant
should be allowed to amend. I will be pleased to
see counsel at Chambers and hear any suggestions
as to the proper practice to now free the case from 111
the complications in which it is involved.

112 U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

vs.

JOHN P. SUNDBERG.

113 LACOMBE, *C. J.*—In this case, I think, the averments in the amended libel which was before the Court of Appeals are sufficient to enable libellant to raise the point he argued.

But if they were not, the particulars in which he considers them defective are such as he might have anticipated when he prepared and served it. The principles laid down in Marshall *vs.* Holmes, 141 U. S., being no new doctrine, but as therein stated, well settled law. Having failed to make his averments as full as his own conception of that settled law now leads him to think they should be, it would be unfair at this stage of the case, after his point has been heard and decided adversely by the Court of
114 Appeals, to allow further amendments so as to bring in again parties whose claims that Court dismissed.

December 10, 1892.

Order signed.

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held at the Post Office Building in the City of New York, on the 10th day of December, 1892. 115

Present—Hon. E. HENRY LACOMBE, *Circuit Judge.*

GEORGE BAILEY *et al.*,
Libellants,

AGAINST 116

JOHN P. SUNDBERG,
Respondent.

A motion having been made by the respondent to resettle the order entered herein on October 13, 1892, and for such other and further relief as may be just, and after hearing William W. Goodrich for the motion, and George A. Black, opposed, it is now, on motion of Goodrich, Deady & Goodrich, proctors for the respondent,

Ordered, that the motion of the respondent be granted; and it is further 117

Ordered, that the amended libel herein, filed August 4, 1892, be stricken from the files of the Court, and that the order entered herein on August 4, 1892, allowing the libellants to amend the libel, be and the same is hereby vacated, and that the motion to amend be, and the same is hereby in all things denied, and that the order entered herein on the 13th day of October, 1892, that the respondent file a stipulation, be also vacated and set aside.

E. H. LACOMBE.

118 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*

vs.

JOHN P. SUNDBERG.

The libellants, George Bailey, Horace H. Chittenden, as assignee of Alfrederick S. Hatch; Charles R.
119 Harrington and William Anderson, as executors of David Carll, deceased; Franklin Osborn, Charles Osborn, John A. Laird, Jane Laird, Charles H. Valentine, William H. Bailey, George W. Piper, S. E. Birdsall, as executor of Lemuel H. Hopkins, deceased, and Euphemia Osborn, as administratrix of Lucien Osborn, deceased, appeal to the United States Circuit Court of Appeals for the Second Circuit from the order and decree entered herein on the 10th day of December, 1892.

Dated December 20, 1892.

GEORGE A. BLACK,
Proctor for Libellants.

To Messrs. GOODRICH, DEADY & GOODRICH,
120 Respondent's Proctors.

JOHN A. SHIELDS, Esq.,
Clerk.

Filed December 22, 1892.

(Endorsed)—U. S. Circuit Court, Southern Dist. of N. Y.—George Bailey *et al. vs.* John P. Sundberg.—George A. Black, Proctor for Libts., 44 Pine Street, New York City.

Clerk of Circuit Court of U. S. may certify these papers as record.—N. Y., Jan. 26th, 1893. —Goodrich, Deady & Goodrich.—Geo. A. Black, Proc. Liblt.

CIRCUIT COURT OF THE UNITED STATES, 121

SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY *et al.*,
Libellants and Appellants,

vs.

JOHN P. SUNDBERG,
Respondent and Appellee.

122

The libellants assign as error:

That the decree or order of the U. S. Circuit Court, bearing date in its caption December 10, 1892, was erroneous in the law and ought to be reversed.

GEO. A. BLACK,
Proctor for Libellants.

Endorsed)—Due service of a copy of the within assignment of errors is hereby admitted.—Dated Jan'y 28, 1893.—Goodrich, Deady & Goodrich, Proc. for Respts.—U. S. Circuit Court.—Filed Jan. 28, 1893.—John A. Shields, Clerk.

123

124 U. S. CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE BAILEY, HORACE H. CHITTENDEN, Assignee of Alfrederick S. Hatch; Charles R. Harrington and William Anderson, as Executors of David Carll, deceased; Franklin Osborn, Charles A. Osborn, John A. Laird, Jane
125 Laird, Charles H. Valentine, William H. Bailey, George W. Piper, S. E. Birdsall, as Executor of Lemuel H. Hopkins, deceased, and Euphemia Osborn, as Administratrix of Lucien Osborn, deceased, owners of the schooner "JOHN K. SHAW,"
Libellants and Appellants,

vs.

JOHN P. SUNDBERG,
Respondent and Appellee.

126

TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The appeal of George Bailey *et al.*, the above named libellants and appellants, respectfully showeth:

That on the 5th day of February, 1890, the above named libellants, together with the Virginia Home Insurance Company, filed their libel in the District Court of the United States for the Southern District of New York against John P. Sundberg, in a cause, civil and maritime, for the recovery of damages al-

leged to have been sustained by them through the loss 127
of the schooner *John K. Shaw* and her cargo by collision with the steamship *Newport*, of which said respondent was master, and that process with clause of foreign attachment issued upon the said libel and said attachment was levied upon the credits and effects of said respondent in the hands of said garnishees. That said respondent thereupon appeared in said cause and filed his answer to said libel, to which the libellants filed exceptions, and such proceedings were had in said cause that, on the 16th day of October, 1890, the said exceptions of the libellants were overruled by the District Court and leave granted to the libellants to file an amended libel. That the libellants having filed an amended libel 128
herein, exceptions thereto were filed by the respondent and such proceedings thereupon had that on the 21st day of March, 1891, a final decree was made and pronounced by the said District Court, sustaining the respondent's exceptions to the libel and dismissing the libel with costs.

That after such final decree, your petitioners duly appealed therefrom to the Circuit Court of the United States for the Southern District of New York, and the said cause was removed thereby into the said Circuit Court, and such proceedings were had in the said Circuit Court that afterwards, on the 7th day of July, 1891, the said Circuit Court made a final decree *pro forma* in the said cause, whereby 129
the decree of the said District Court was affirmed, which said decree of the said Circuit Court was, as these appellants were advised, erroneous and ought to be reversed.

That thereafter these appellants appealed from the whole of said decree of said Circuit Court to the United States Circuit Court of Appeals for the Second Circuit, which thereafter affirmed so much of said decree appealed from as dismissed the libel of appellants, and remanded the said cause to the said Circuit Court with instructions to dismiss said libel as to all libellants except the

Virginia Home Insurance Company. That thereafter the mandate of said Circuit Court of Appeals was duly filed in said Circuit Court, and before any final decree had been entered thereon, libellants moved the said Circuit Court for leave to amend their said amended libel, and said Court, by its order duly made on the 25th day of July, 1892, granted said motion in respect to the matters specified in said order, and thereupon and on the 4th of August, 1892, the libellants filed their libel in the said Circuit Court amended as permitted by said order. That thereafter the said Circuit Court, on motion of the respondent, granted leave to said respondent to reargue said motion to amend upon the grounds stated in the said respondent's brief, there being then no notice in writing of said motion, other than said brief, and such reargument was had, and the said Circuit Court thereafter and on the 10th of December, 1892, made its order granting the said motion for reargument and directing the libel so amended pursuant to said order to be struck from the files of this Court, and the order allowing said amendment to be vacated, from which order these libellants appeal to the Circuit Court of Appeals and allege that the said order of the said Circuit Court is erroneous and ought to be reversed, and pray that said United States Circuit Court of Appeals for the Second Circuit will proceed to hear the said cause anew and that the motion of the said libellants to amend their said libel be granted, and the said libel ordered on file in the said Circuit Court, or said cause remanded to the said Circuit Court with instructions to allow said amendment, and that the said order of the Circuit Court hereby appealed from and every part thereof may be reversed and the libellants have such other relief or decree as to the said Court shall seem just.

Dated New York, January 27, 1893.

GEO. A. BLACK,
Proctor for Libellants-Appellants.

Allowed:

E. HENRY LACOMBE.

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States in the Second Circuit. 133

To John P. Sundberg:

Whereas, George Bailey *et al.*, owners of the schooner *John K. Shaw*, &c., have appealed to the United States Circuit Court of Appeals for the Second Circuit, from the final decree lately rendered in the Circuit Court of the United States for the Southern District of New York in the Second Circuit, made in favor of you, John P. Sundberg, and have filed the security required by law, you are hereby cited to appear before the said United States 134
Circuit Court of Appeals for the Second Circuit at the City of New York, on the 24th day of February next, to do and receive what may appertain to Justice to be done in the premises.

Given under my hand at the City of New York in the Southern District of New York, on the 27th day of January, 1893, and of the Independence of the United States the one hundred and seventeenth.

E. Henry Lacombe.

(Endorsed)—Due service of a copy of the within petition and citation is hereby admitted.—Dated January 28, 1893.—Goodrich, Deady & Goodrich, Proc. for Respt.—U. S. Circuit Court. 135
Filed Jan. 28, 1893.—John A. Shields, Clerk.

136 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to sixty, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of George Bailey *et al.*, libellants and appellants, against John P. Sundberg, respondent and appellee, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the
137 said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the said United States the one hundred and seventeenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Filed Jany. 30, 1893.—John A. Shields, Clerk.

138

154254 94

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

CC
54 Fed 889

To the Hon. E. Henry Lacombe, Judge of the Circuit Court of the United States for the Second Circuit.

To John A. Shields, Esq., Clerk of the said Circuit Court.

Please take notice that the foregoing petition and a certified copy of the proceedings in the suit of the Virginia Home Insurance Company against John P. Sundberg, in Admiralty, from the time of the filing of the mandate of the Circuit Court of Appeals therein to the present time, will be presented to the Supreme Court of the United States at the Capitol in the City of Washington on the 8th day of January, 1894, at the opening of Court on that day, and leave then and there asked to file the same, and a motion made that a mandamus issue as prayed for in said petition, and the said Court will then be referred (if necessary) to the certified copy of the record in the case of Bailey vs. Sundberg, filed on February 29, 1893.

Dated December 30, 1893.

Yours, etc.,

Geo. A. Black,
Proctor and of Counsel for Petitioners,
44 Pine Street,
New York City.

TO THE SUPREME COURT OF THE UNITED STATES,

The petition of the VIRGINIA HOME INSURANCE COMPANY respectfully shows :

That on the 5th day of February, 1890, your petitioners, as the insurers of the cargo of coal (and owners thereof by subrogation) laden on board the schooner "John K. Shaw," filed their libel in the U. S. District Court for the Southern District of New York against John P. Sundberg, the master of the SS. "Newport," alleging that the said schooner "Shaw" had been sunk by a collision with the "Newport" while in command of respondent Sundberg, and seeking to hold him liable for the value of the said cargo. That such proceedings were thereafter had therein that the said District Court dismissed the said libel (see 44 F. R., 808) on or about the 21st day of March, 1891. That your petitioners appealed from the final decree of the District Court to the Circuit Court of the United States for the Southern District of New York, where said decree was on the 7th day of July, 1891, affirmed *pro forma*, and thereupon your petitioners appealed from said decree of the said Circuit Court to the U. S. Circuit Court of Appeals for the Second Circuit, which, by its mandate bearing date the 29th day of March, 1892, remitted the said cause to the said Circuit Court and required the said Circuit Court to dismiss the libel of all the libellants *except the Virginia Home Insurance Company*, and as to that libellant to overrule the exceptions of the respondent to the amended libel, and to take such further proceedings as might be proper and in conformity to the decision of the said Circuit Court of Appeals. That thereafter the said Court, by its order entered on the 26th day of July, 1892, overruled the exceptions of the respondent to the amended libel of the Virginia Home Insurance Company, and thereafter

and on or about the 23d day of December, 1892, the said respondent filed its answer to the libel of petitioner, setting forth as a plea of *res adjudicata* the following matter:

"NINTH. The respondent further alleges that on or "about the 24th day of April, 1884, Alfrederick S. "Hatch, David Carll, Franklin Osborne, Charles Os- "born, Lemuel H. Hopkins, John A. Laird and "Charles A. Valentine, part owners of the said "schooner 'John K. Shaw,' filed a libel in the District "Court of the United States for the Southern District "of New York against the said steamship 'Newport,' "her engines, etc., and all persons lawfully intervening "for their interest in the same, in a cause of collision, "civil and maritime. That process thereon was duly "issued to the Marshal of the said district, the said "steamship 'Newport' attached by the Marshal there- "under, and a stipulation for value given therein.

"That on or about the 28th day of June, 1884, the "aforenamed libellants, together with Jane Laird, "George Bailey, William H. Bailey, George W. Piper, "S. E. Birdsall, as executor of the last will and testa- "ment of Lemuel H. Hopkins, deceased, and Euphe- "mia Osborn, as administratrix of the estate of Lucien "Osborn, deceased, filed a supplemental libel in said "action; *and that the libellants in said action were "owners of said schooner* 'John K. Shaw,' and "that in each of said libels they alleged the collision "between the steamship 'Newport' and the schooner "'John K. Shaw,' which is alleged, in the libel, "in this action, and sought to recover damages for said "collision.

"That thereafter, and on or about the 7th day of "August, 1884, the New York and Cuba Mail Steamship "Company, the owner of the said steamship, filed its "answer to the said libels, denying that there was any "such collision between the schooner 'John K. Shaw' "and the said steamer 'Newport'; and that thereafter, "and on or about the 6th day of April, 1886, the said

" issue came on to be tried before the said Court, which, " after hearing the pleadings and proofs and argu- " ments of the respective advocates, ordered, adjudged " and decreed that the libel in said action be dis- " missed, with disbursements, but without costs, where- " upon a final decree was entered in said action on " the 9th day of October, 1886.

" That thereafter, and on the 14th day of October, " 1886, the said libellants in said action appealed from " said final decree to the Circuit Court of the United " States for the Southern District of New York, and " thereafter the libellants, on the 19th day of March, " 1887, filed an amended libel.

" That thereafter additional testimony was taken in " the Circuit Court, upon which another trial was had " in the Circuit Court, and on or about the 15th day of " October, 1888, a decision was made in said Circuit " Court affirming the judgment of the District Court, " and dismissing the libel, with costs, which decision " and the decree entered thereon have never been " appealed from or reversed."

" That thereafter, and on or about the 24th day " of October, 1888, the libellants applied for a reargu- " ment and rehearing of the case, which motion was, " on or about the ninth day of April, 1889, denied.

" That on or about the 19th day of March, 1889, the " libellants also made a motion to reopen the case to " examine Leonard S. Holmes, formerly second officer " of the ' Newport,' which motion was opposed by the " claimants, and denied, all of which appears on the " records of the United States District Court for the " Southern District of New York."

That thereafter, and on or about the 29th day of December, 1892, libellant filed exceptions to the said answer of the respondent ; among others the following :

" VII. Libellent excepts to the sufficiency, fullness " and distinctness of the ninth article of the said

" answer, in that it does not (1) state what was the " nature of the claim made in the libel of Hatch and " others therein mentioned, nor (2) what was done " by the Marshal after the issuing of process " therein, nor (3) by whom the said vessel was " claimed, nor (4) for what value said stipulation " was given, nor (5) does the said article of " the answer set forth the nature and amount of the " claims of the supplemental libel mentioned in said " article, nor (6) what was done upon the return of " process issued on said libel, nor (7) who appeared on " such return of said process, and (8) what defaults, if " any, were taken.

" VIII. Libellant excepts to the matters alleged in " the ninth article of said answer, on the ground that " the same is insufficient in the law to constitute a " defense to this action, and on the further ground that " by the decision of the Circuit Court of Appeals on " the appeal of the libellants herein, such matter " has been adjudicated to be insufficient in law to " constitute a defense, and that such matter is " irrelevant under Rule 28 of the Supreme Court Ad- " miralty Rules."

That thereafter the said exceptions were argued before the said Circuit Court, and the said exceptions numbered 7 and 8, above recited, were by the said Court overruled and disallowed, and that thereafter your petitioner applied to the said Court for leave to reargue the said exceptions, and said reargument was had and the motion therefor denied.

That thereafter your petitioner applied to the said Circuit Court to reargue the said motion to reargue, and that such reargument was had and thereupon the said Court sustained the seventh exception to the said ninth article of the answer, above recited, and overruled the eighth exception thereto, writing the opinion (filed February 6, 1893) reported in 54 F. R., 389, in which the only reference to the ninth article of the answer and the seven and eight exceptions thereto was in these words:

" The seventh exception, namely, to the ninth article, " is sustained. *The various points as to which express " averments are asked for seem material to the sufficiency " of the defense set up and should be pleaded.* In all " other respects my former opinion remains unchanged."

That thereafter an order was duly entered in the said Circuit Court, as follows :

" At a Stated Term of the Circuit Court of " the United States, held at the " Court Rooms thereof, in the Post- " office Building, in the City of New " York, on the 21st day of Septem- " ber, 1893.

" Present—Hon. E. Henry Lacombe, Judge.

" The Virginia Home Ins. Co.

" vs.

" John P. Sundberg.

" The libellant having filed ten exceptions to the " answer of the respondent, and respondent having " noticed said exceptions for argument, and argument " thereon having been had by Geo. A. Black, proctor " for libellant, and W. W. Goodrich, proctor for re- " spondent, and due deliberation having been had, it is

" I. Ordered, that the first exception be disallowed.

" II. Ordered, that the second exception be allowed, " and that the respondent amend the third article of " his answer, either by striking out the word 'notice' " in the sentence 'had full notice and knowledge,' &c., " or by stating what kind of notice is intended, if some " specific one is relied on ; and it is further

" (III.) Ordered that so much of the third exception " to the fourth article of the answer as denies knowl- " edge as to the allegation of the third article of the " third amended libel, which alleges, that at the time of " said collision it was after dark, the evening clear, the " stars shining, but no moon, and a strong wind was " blowing from about the northwest," be allowed, and respondent required to answer the said matters separately and distinctly.

" (IV.) That the fourth exception of libellant to the " fifth and eighth articles of the answer is allowed, and " respondent is required to amend the fifth article of " said answer by answering separately and distinctly " the matters contained in the fourth article of the " third amended libel, by admitting or denying " separately and distinctly the following allegations of " fact therein :

" 1. That the 'Newport' passed out to sea 'through " ' the Swash Channel' in part."

" 2. That she so passed in part 'through the South " ' Channel.' "

" 3. That she so passed on a 'course of about S. E. " ' ½ S.' "

" 4. Which was the 'usual channel course.' "

" 5. That 'at 5:35 P. M. she had Sandy Hook light " ' bearing abeam.' "

" 6. That 'at 5:40 P. M. she had Saudy Hook light " ' bearing west.' "

" 7. That when she passed 'Scotland' lightship at " 5:50 P. M. 'it bore west.' "

" 8. That at such time it was 'about one quarter of a " ' mile distant.' "

" 9. That she took her course of about S., ½ W., " when distant about one-quarter of a mile from Scot- " land Lightship, bearing west.

" (V.) That so much of the fifth exception to the " sufficiency, fullness and distinctness of the fifth arti- " cle and eighth article of the said answer, in that the " fifth article does not state : *(a)* at what distance the

" 'Newport' passed Scotland Lightship: *(b)* and does " not state in what direction the Scotland Lightship " was bearing from the 'Newport' at the time she was " a mile and a half distant therefrom and took a course " of about S. by E.: *(c)* and does not state either how " long a time she continued on the course of S. by E., " nor: *(d)* the distance she ran on that course, nor: *(e)* " where she was when she changed her course to S., " ½ W., nor: *(f)* at what time she made such change, " nor: *(g)* what distance she ran on that course, nor: *(h)* " where she was at the time of the collision referred to " in the libel and said fifth article, is hereby overruled " on the ground that it does not appear that respondent " has knowledge of such matters, nor that he intends " to rely upon them upon the trial.

" (VI.) That the libellant's sixth exception to the " sufficiency, fullness and distinctness of the eighth " article of the libel, is overruled on the ground that " the details of the 'Newport's' collision with some " other vessel than the 'John K. Shaw' are irrelevant " to the controversy herein.

**" (VII.) The libellant's seventh exception to the ninth article of said answer is allowed, and the respondent is required to amend said article by alleging:**

**" 1. The nature of the claim made in the libel of Hatch and others.**

**" 2. What was done by the Marshal after the issuing of process therein?**

**" 3. By whom the "Newport" was claimed.**

**" 4. For what value said stipulation was given.**

**" 5. The nature and amount of the claims of the supplemental libel.**

**" 6. What was done upon the return of process issued on said libel.**

**" 7. Who appeared on said return of process.**

" **8. What defaults were taken.**

" **(VIII) That the libellant's eighth ex-**
" **ception to the ninth article of said an-**
" **swer, on the ground that the same is in-**
" **sufficient in the law to constitute a de-**
" **fence, is hereby overruled.**

" (IX) That the libellant's ninth exception to the " tenth article of the said answer be overruled.

" (X) That the libellant's tenth exception to the " eleventh article of said answer be overruled.

" And libellant having moved to amend his excep-
" tions by adding thereto two exceptions, numbered " eleventh and twelfth,

" It is ordered that said motion be, and the same is,
" hereby denied. E. HENRY LACOMBE."

which order was duly served on the proctor for the respondent.

**That thereafter, and on due notice to the respondent, your petitioner applied to the said Circuit Court to enter an order in the following words:**

" At a Stated Term of the Circuit Court of
" United States for the Southern
" District of New York in the Second
" Circuit, held at the Court Rooms
" thereof in the Post-Office Building,
" in the City of New York, on the
" day of , 1893.

" Present—Hon. E. Henry Lacombe, Circuit Judge.

" The Virginia Home Insurance Co.
" vs.
" John P. Sundberg.
} Final Decree.

" The libellant, having filed its exception, numbered " eighth, to the matters alleged in the article of the " answer of the respondent herein numbered ninth, on " the ground that the same is insufficient in law to " constitute a defense, and the libellant's said exception " having been overruled, it is

" Ordered, that the libel of the Virginia Home In- " surance Company against John P. Sundberg be, and " the same hereby is, dismissed " :—

And that Hon. E. Henry Lacombe, Judge of the said Circuit Court, refused to make or sign any such order, assigning as reasons therefor the following:

" To sign this decree would be substantially to " decide that the ninth article of the answer to the " third amended libel *is sufficient to constitute a* " *defense.* But this Court has held the direct con- " verse of that proposition. See last paragraph of " opinion filed Feby. 6th, 1893, and Par. VII. of order " filed Sept. 21st, 1893.

" *Unless the respondent amends the ninth article it* " *is of no avail to him as a defense.* If he chooses not

" to amend he goes to trial practically with that article
" stricken out. If he decides to amend so as to avoid
" the exception to the ninth article, which the Court
" sustained, there will then be opportunity to test the
" sufficiency of his new pleading by exceptions thereto.
" This application is premature and unnecessary. Li-
" bellants are fully protected now, if there be no
" amendment, and if respondent unreasonably delay
" amending he may be compelled to make his election
" by some proper proceeding.

" Sept. 29th, 1893.

" E. H. LACOMBE."

And petitioner further alleges that, although the Court in the above *opinion* says that " unless the " respondent amends the ninth article it is of no avail " to him as a defense," yet it has, by its *order* above quoted, sustained said ninth article of the answer as a sufficient defense, and the respondent has not amended, and there is no reason, in law, why he should amend a sufficient defense, inasmuch as the ninth article of the said answer has been sustained and the eighth exception of the petitioner thereto, as insufficient in the law to constitute a defense, overruled, and by said exception the petitioner has admitted all matters alleged in the said eighth article of the answer, it is manifest that the necessary consequence thereof is that its libel must be dismissed, and that it is entitled to have a final decree duly entered dismissing the said libel, to the end that it may appeal therefrom to the U. S. Circuit Court of Appeals, and there review the said decision of the said Circuit Judge, and that by his refusal to enter such a decree your petitioner is prevented from taking such appeal or from any review of the action of the said Circuit Court. And petitioner further alleges that the said matters, above quoted, alleged in the eighth article of the answer, were alleged in the answer interposed by the same respondent to the libel of petitioner in the

said District Court, and that the libellants excepted thereto, and that said exceptions were overruled by the said District Judge (see 43 F. R., 81, and the record of said proceedings filed in this Court on February 29, 1893), and that thereafter, under Admiralty Rule 51 of this Court, by leave of the District Judge, the libellants amended their libel therein by setting up matter in avoidance of the said plea of *res adjudicata*. That thereafter the respondent filed exceptions to such matter of avoidance of the said amended libel, and that the said District Judge sustained such exceptions, and dismissed the said libel (see 44 F. R., 808); and that the said plea of *res adjudicata* was before the Circuit Court of Appeals on petitioner's appeal, and was by its decision held to be insufficient to constitute a defense. See 49 F. R., 583, where that Court said, speaking of Hatch vs. Newport (585):

" In the first suit, *not only was there no such service* " *of process as the rule prescribes*, but no default was " entered upon the return of monition, and the property " arrested was released upon giving security sufficient " to satisfy the claims of the owners of the 'Shaw' " against the arrested steamship."

(NOTE—No security was given to satisfy the claim of the petitioner as owner of the cargo, for that claim was not embraced in the libel in Hatch vs. the Newport).

" Thus the suit was prosecuted and conducted " throughout as one in which the only parties in inter- " est were the formal parties to the suit—the owners " of the schooner and the owner of the steamship. * * * " In this view it is obvious that the cargo owner is not " concluded by it, from re-examining the question " whether the loss was caused by the alleged collision " between the schooner and the steamship."

And petitioner further alleges that in the face of the said adjudication the said Circuit Court has sustained the said ninth article of the answer of the respondent.

Wherefore petitioner prays that this Court will issue its **writ of mandamus** to the Judges of the United States Circuit Court for the Second Circuit, **requiring them and each of them, upon presentation to them or either of them of the decree in the form herein set forth, or in such other form as may be determined by them to be proper, to enter a proper decree dismissing your petitioner's said libel,** to the end that your petitioner may appeal therefrom to said Circuit Court of Appeals for the Second Circuit, and that this Honorable Court will otherwise order as appertains to right and justice.

And your petitioner will ever pray, &c.

THE VIRGINIA HOME INSURANCE COMPANY,
By GEO. A. BLACK,
Proctor.

---

SOUTHERN DISTRICT OF NEW YORK, ss.:

GEORGE A. BLACK, being duly sworn, says that he is the proctor for the Virginia Home Insurance Company in the admiralty proceeding mentioned in the foregoing petition, and the counsel for petitioner on this application, and that all the facts stated in the foregoing petition are true of deponent's own knowledge.

GEO. A. BLACK.

Sworn to before me this 28th day of December, 1893.

LAWRENCE KNEELAND,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.